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No. 14714

**In the United States Court of Appeals
for the Ninth Circuit**

UNITED STATES OF AMERICA, APPELLANT

v.

**AHTANUM IRRIGATION DISTRICT, A CORPORATION, ET AL.,
APPELLEES**

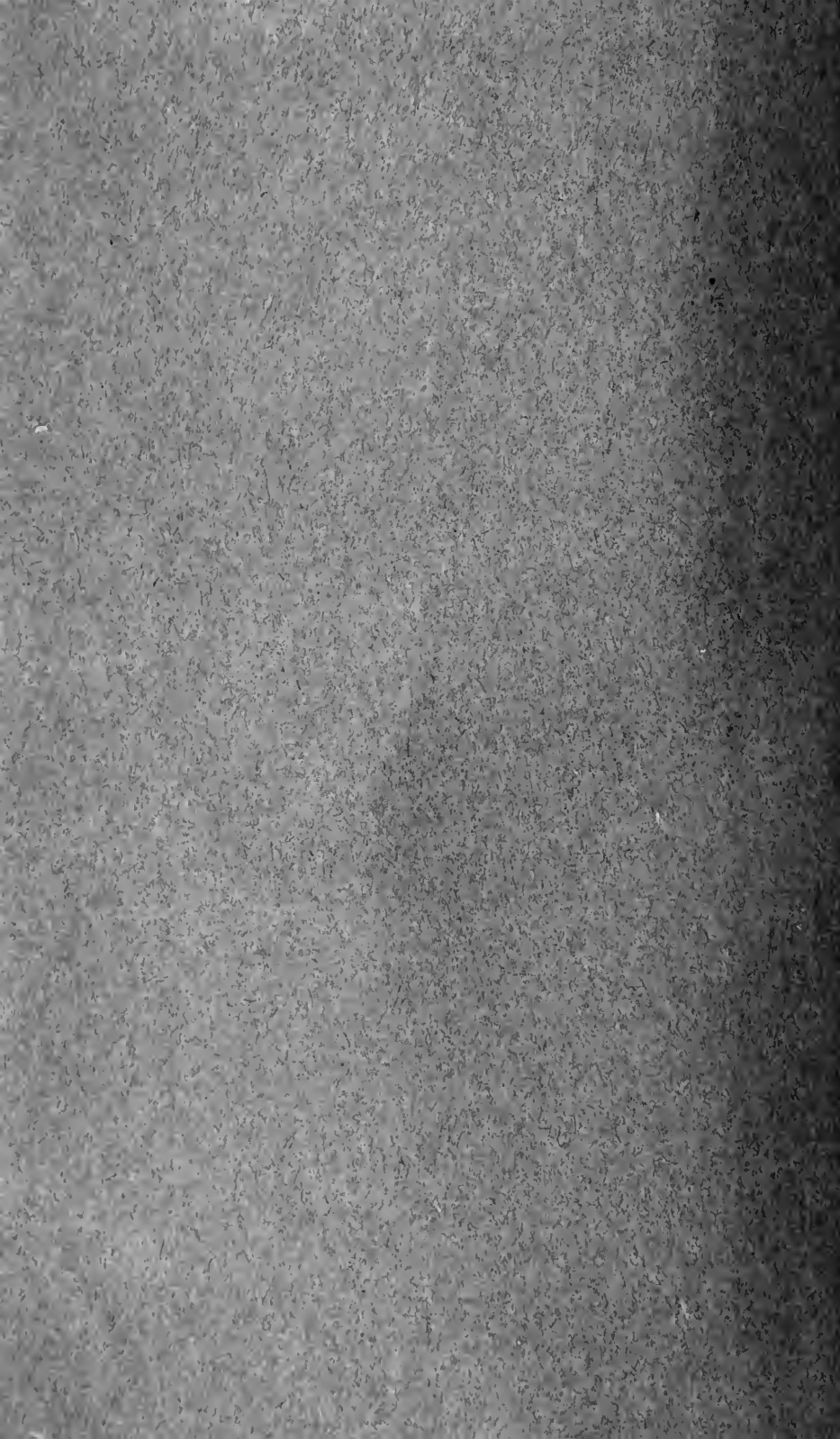
**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN
DIVISION**

BRIEF FOR THE APPELLANT

FILED

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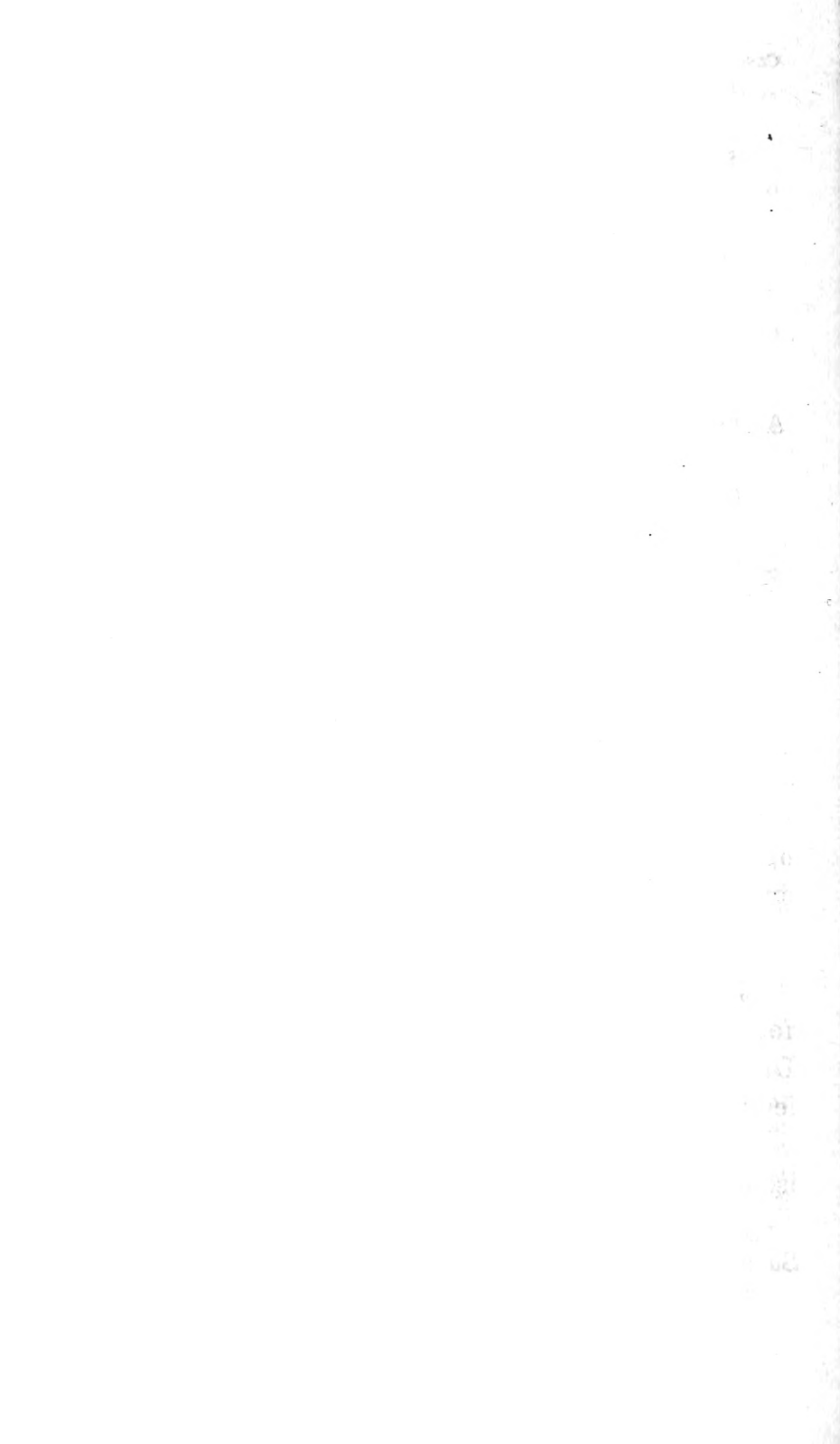
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APPELLEES

*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN
DIVISION*

BRIEF FOR THE UNITED STATES OF AMERICA, APPELLANT

OPINION BELOW

The trial court entered its opinion on March 7, 1953, which was amended and supplemented by an opinion dated January 18, 1954, but which was not entered until May 4, 1954.¹

JURISDICTION

The jurisdiction of the United States District Court for the Eastern District of Washington, Southern Division, was invoked by the United States of America pursuant to the act which provides that:

“* * * the district courts shall have original jurisdiction of all civil actions, suits or proceedings

¹ *United States v. Ahtanum Irrigation District, et al.*, 124 F. Supp. 818 (U. S. D. C. E. D. Wash. S. D. 1954).

commenced by the United States * * *.”² Jurisdiction to review the judgment below has been conferred upon this court by Congress.³

**THE TREATY, CONSTITUTIONAL PROVISIONS AND STATUTES
WHICH ARE INVOLVED**

The Treaty of June 9, 1855, between the United States of America and the Yakima Tribe of Indians is before this Court for construction.⁴

There is presented for determination the breadth of application of the Constitutional proviso that the Congress shall have the power “To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”⁵

The Enabling Act for the State of Washington and the Constitution of the State of Washington, both of which provide that the “Indian lands [which include those here involved] shall remain under the absolute jurisdiction and control of the Congress of the United States, * * *,”⁶ are before this Court for interpretation.

The Acts of 1866, 1870,⁷ and the Desert Land Act of 1877⁸ providing for appropriation of rights to the use of water on “public” lands are directly involved in this cause.

² 28 U. S. C. 1345.

³ 28 U. S. C. 1291.

⁴ 12 Stat. 951, 11 Kapler 698; The Text of the Treaty is set forth R. 16, Exhibit A of the complaint.

⁵ Constitution of the United States, Article I, Section 8, Clause 3.

⁶ Enabling Act, Section 4, Section subdivision 25 Stat. 676; Constitution of the State of Washington, Article XXVI, Second subdivision.

⁷ 43 U. S. C. 661.

⁸ 43 U. S. C. 321.

Likewise involved is the Federal Declaratory Judgment Act.⁹

FACTS

Important in regard to the facts of this case is the Pre-trial Order containing admissions of the respective parties,¹⁰ the stipulation pursuant to which the exhibits of the United States of America were admitted in evidence without objection,¹¹ and the general agreement among the parties respecting the salient issues involved.¹²

As revealed by the complaint,¹³ this litigation pertains to:

(a) A controversy between the United States of America, plaintiff-appellant, representing the Yakima Tribe of Indians, and Ahtanum Irrigation District, together with individual claimants, defendants-appellees, over rights to the use of water from Ahtanum Creek, a tributary of the Yakima River in the State of Washington;

(b) The validity of an alleged agreement purporting to give to the water users within the Ahtanum Irrigation District 75% of the flow of Ahtanum Creek, and 25% of that flow to the Yakima Tribe of Indians.

⁹ 28 U. S. C. 2201.

¹⁰ R. 123, et seq., Pre-trial Order.

¹¹ R. 99.

¹² Respecting the exhibits admitted into the record without objection reference is made to the fact that the list of those exhibits set forth in the Pre-trial Order was omitted from the Record in printing. Similarly omitted from the printed Record are exhibits to the Pre-trial Order, A and B. The Pre-trial Order exhibits A and B are Appendices A and B of this brief. The Pre-trial Order list of exhibits is Appendix C of this brief.

¹³ R. 3 et seq.

On the basis of those introductory comments, the facts giving rise to this litigation will be reviewed.

Ahtanum Creek: “Ahtanum Creek is a nonnavigable stream, rising on the eastern slope of the Cascade Mountains in the State of Washington, flowing thence slightly north a distance of forty miles, emptying into the Yakima River about four miles south of the City of Yakima, Washington. Two forks of that stream unite to form the main channel of Ahtanum Creek eighteen miles above the point where it enters the Yakima River.”¹⁴

The Treaty of June 9, 1855:¹⁵ By the Treaty of 1855 the Yakima Indians reserved to themselves a large tract of land now in the State of Washington. That land was reserved by those Indians as “a home and abiding place.” The balance of the lands previously occupied by them was ceded to the United States of America.

Ahtanum Creek is the northern boundary of the Yakima Indian Reservation.¹⁶

Ahtanum Creek Valley is the Cradle of Irrigation in the State of Washington: The lands here involved are arid in character; “* * * to make these lands productive large quantities of water are required for the purpose of successfully and adequately irrigating

¹⁴ R. 124, Pre-trial Order, Agreed Facts, paragraph 3. See also United States of America, plaintiff’s exhibits 5a, 5b—maps disclosing respectively Ahtanum Indian Irrigation system and Ownership, Development of Ahtanum Irrigation System.

¹⁵ Set out in full R. 16 et seq.

¹⁶ R. 123, Pre-trial Order, Agreed Facts, paragraph 1; Treaty, R. 17.

them.”¹⁷ In 1847, prior to the Treaty of 1855, waters were being diverted from Ahtanum Creek to irrigate the arid lands bordering that stream.¹⁸ In the words of Mr. John H. Lynch, an attorney for defendants, when reviewing the history of Ahtanum Valley, “Let it be said, however, that Ahtanum [Creek] was the cradle and proving ground of irrigation in the State of Washington; * * *.”¹⁹

The Ahtanum Indian Irrigation Project as Presently Constructed Was Completed in the Year 1915:

As observed above, Ahtanum Creek was the cradle of irrigation in the State of Washington with waters being diverted from that stream for purposes of irrigation as early as 1847. In the years which followed, waters were diverted from Ahtanum Creek to irrigate not only the Indian lands but those lands lying north of the stream by the defendants or their predecessors in interest. In 1894 the United States of America commenced systematic aid to the Yakima Tribe of Indians for the irrigation of the lands here involved. Construction of the Ahtanum Indian Irrigation Project to its present size was initiated August 6, 1908, and the work of construction was completed in the year 1915.²⁰ Progress towards completion of the Ahtanum Irrigation system to its present size is graphically disclosed by maps which are part of the record

¹⁷ R. 124, Pre-trial Order, Agreed Facts, paragraph 2.

¹⁸ R. 124, Pre-trial Order, Agreed Facts, paragraph 4.

¹⁹ R. 124. United States of America, plaintiff's Exhibit 12, Yakima Valley Catholic Centennial, the Beginning of Irrigation in the State of Washington.

²⁰ R. 124, Pre-trial Order, Agreed Facts, paragraph 4.

in this case.²¹ There are presently 4,968 acres of land in the Yakima Indian Reservation which “is now or is susceptible of being served by the Ahtanum Indian Irrigation Project system as presently constructed and substantially completed in the year 1915.”²²

Description of Ahtanum Indian Irrigation Project, Its Structures, the Lands Serviced by It, the Duty of Water and the Quantities of Water Diverted to Irrigate those Lands: It has been agreed among the parties that “The diversion duty for the lands in the Ahtanum Indian Irrigation Project is 4.4 acre-feet per irrigation season.”²³ Reference in that connection is made to the fact alluded to above, that there are 4,968 acres to be served by the irrigation system in question. The ditches diverting water to serve the Ahtanum Indian Irrigation Project are described with particularity in the Pre-trial Order.²⁴ These salient facts have likewise been agreed to by the parties: “Attached, marked ‘Exhibit A’ and by reference made a part of this Pre-Trial Order is a tabulation relating to lands located south of Ahtanum Creek in the Yakima Indian Reservation, disclosing (1) the allotment number, (2) names of ditches, (3) dates relating to initiation and history of increase of irrigation by allotments, (4) location of points of diversion, (5) total irrigated acreage (maximum), (6) description of irrigated acreage, (7) irrigable acreage (maximum), (8) description of irrigable acreage, and (9)

²¹ Please refer to United States of America, plaintiff’s Exhibit 5b; also 5a.

²² R. 128, Pre-trial Order, Agreed Facts, paragraph 10.

²³ R. 125, Pre-trial Order, Agreed Facts, paragraph 5.

²⁴ R. 125, et seq., Pre-trial Order, Agreed Facts, paragraph 5.

comments.”²⁵ The data alluded to in the last quoted paragraph is contained in Appendix A of this brief.

Correlative with the date alluded to immediately above is the following, likewise agreed to among the parties: “The attached exhibit to this Pre-Trial Order marked ‘B’ reflects the stream flow records of the north fork of Ahtanum Creek, the south fork of Ahtanum Creek and the diversion records for the canals of the Ahtanum Indian Irrigation Project together with an analysis of those diversions.”²⁶ This data is set forth in Appendix B of this brief.

Title to the Lands Within the Ahtanum Indian Irrigation Project: It is admitted among the parties that: “The lands on the reservation side of Ahtanum Creek involved herein were allotted according to law and regulations to individual Indians.”²⁷ Those lands are part of the Yakima Indian Reservation which those Indians “reserved as a home and abiding place” when they conveyed to the United States of America by the Treaty of June 9, 1855, a much larger area.²⁸ Regarding the admissions as to title to those lands and the allotment of those lands all of which have been agreed to among the parties, reference is made to the evidence adduced by the United States of America upon which the admissions in question were predicated.²⁹

²⁵ R. 127, Pre-trial Order, Agreed Facts, paragraph 6.

²⁶ R. 129, Pre-trial Order, Agreed Facts, paragraph 12.

²⁷ R. 128, Pre-trial Order, Agreed Facts, paragraph 9.

²⁸ R. 123, Pre-trial Order, Agreed Facts, paragraph 1.

²⁹ United States of America, plaintiff’s Exhibit 1, et seq. United States of America, plaintiff’s Exhibit 2, et seq. United States of America, plaintiff’s Exhibit 3, et seq. United States of America, plaintiff’s Exhibits 4b, 4c, 4d.

Ahtanum Creek's Yield Falls Far Short of the Demands of the Yakima Indians and the Defendants: Included among the admissions in this proceeding is the following: "There are not sufficient waters in Ahtanum Creek to irrigate lands on both sides of said creek now being partially irrigated from that source."³⁰ Reference in that connection is also made to the agreement among the parties that, "The diversion duty for the lands in the Ahtanum Indian Irrigation Project is 4.4 acre-feet per irrigation season."³¹ Relative to the shortage reference is made to this analysis elicited into the record without objection:

Q. Now, could you state the number of acre feet per year per acre, the average number of acre feet per year per acre of land which was received by the Ahtanum Indian Irrigation Project?

A. I believe the record for the main canal, according to my memory, is 2.68 on an average for the period 1920 to 1948.

Q. Now, would you state the quantity of water which was received in acre feet per acre per year prior to the first of July? Do you recall those figures?

A. Yes. That average for the period of 1920 to 1948 was 2.11 acre feet per acre.

Q. Now, how does that compare with the quantity of water per acre per year they received subsequent to the first of July?

A. That would mean that there would be approximately a half an acre-foot per acre received over the three months' period subsequent to the first of July.

³⁰ R. 129, Pre-Trial Order, Agreed Facts, paragraph 11.

³¹ R. 125, Pre-trial Order, Agreed Facts, paragraph 5.

Q. Now, would you state the effect that that has upon the agricultural economy of the area we will refer to as the Ahtanum Indian Irrigation Project?

A. The effect of that delivery of water, the bulk of which is in the first half of the irrigation season, namely, April, May and June, limits to a great extent the type of the crop that can be raised on that area to those crops that can be matured during the first half of the irrigation season prior to the first of July.

Q. By way of example, would you state what that means from the standpoint of the raising of alfalfa on this project, on the Ahtanum Indian Irrigation Project?

A. On a short water year, such as we have this year, it is going to limit the cutting of alfalfa to two cuttings instead of three.

Q. Does it have any other effect from the standpoint of fall feed?

A. With a full water supply, it would make three cuttings with a good pasturage subsequent to the third cutting.³²

1906 Is the Year in Which the Subject Matter of This Case Was First Referred to the Department of Justice for Action: *Munn v. Redman* was initiated in May of 1906 by a water user north of Ahtanum Creek to enjoin the diversion of waters from that stream for use in the Ahtanum Indian Irrigation Project by an employee of the United States of America.³³ That case was referred to the Attorney General of the United States of America by a letter

³² R. 444, 445.

³³ United States of America, plaintiff's Exhibit 11-1.

dated August 23, 1906, from the then Acting Secretary of the Interior. Since that date to the present time there has been a continuous and unrelenting conflict between the claims of the Yakima Tribe of Indians to water from Ahtanum Creek and the defendants or their predecessors in interest diverting from the north bank of that stream.³⁴

There is now pending in the United States District Court for the Eastern District of Washington, Southern Division, a "Petition for an Injunction Pending Appeal." The United States of America has answered that petition pursuant to the order of that court and has prayed for an early hearing in connection with that most recent development of the long-standing controversy.

A. *An Attempt to Compromise Munn v. Redman Was Undertaken by Representatives of the Secretary of the Interior:* Result of those efforts to negotiate that controversy are embraced in an alleged agreement dated May 9, 1908. With reference to that alleged agreement Mr. John H. Lynch, an attorney for defendants, declared that "* * * the case of *Munn v. Redman, et al.*, begun * * * in the year 1906," was concluded by "* * * a compromise agreement of 1908."³⁵ By that purported compromise agreement there was allegedly allotted to the defendants or their predecessors in interest north of Ahtanum Creek 75% of the flow of that stream and 25% of it to the Yakima Tribe of Indians.

³⁴ United States of America, plaintiff's Exhibit 11-1 through 11-146.

³⁵ United States of America, plaintiff's Exhibit No. 11-75; R. 547 et seq., Testimony of John H. Lynch.

B. *The Yakima Indians and the United States of America Have Consistently Denied the Validity of the Alleged Agreement of 1908*: Both the United States of America and the Yakima Indians have denied that the alleged agreement of 1908 was valid.³⁶ Moreover, diversions of the waters by the United States of America for use in the Ahtanum Indian Irrigation Project has consistently exceeded the 25% limitation upon the rights of the Indians which the alleged agreement of 1908 purported to fix.³⁷

Congress Refused to Approve the Agreement of 1908: Though defendants sponsored this legislation in 1932, to approve the alleged agreement settling *Munn v. Redman* and apportioning the waters of Ahtanum Creek, Congress did not enact it:

A BILL

Approving and confirming contract for apportionment of waters of Ahtanum Creek, Washington, between Yakima Indian Reservation and lands north thereof, dated May 9, 1908.

Be is enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That that certain agreement made and entered into on the 9th day of May, 1908, by and between W. W. Glidden * * * and W. H. Code, chief engineer of irrigation, Indian Bureau, for and on behalf of

³⁶ United States of America, plaintiff's Exhibit No. 11-32 et seq.

³⁷ Please see in that connection Appendix B disclosing the actual diversions and percentages of water diverted each month during the irrigation season from Ahtanum Creek; stream flows and canal diversions, Ahtanum Creek System, Yakima Indian Reservation, Washington. See also R. 129, Pre-trial Order, Agreed Facts, paragraph 12.

the United States as first party, and approved by the Assistant Secretary of the Interior, June 30, 1908, wherein and whereby the waters of said Ahtanum Creek were apportioned 75 per centum to the lands on the north side of Ahtanum Creek and of the south fork of said Ahtanum Creek and 25 per centum to said Yakima Indian Reservation lands with provisions for the determination of the amount of such flow and the proper distribution thereof, be, and the same hereby is, approved, confirmed, ratified, and established as the proper apportionment and division of the waters of said Ahtanum Creek between the said lands.³⁸ [Emphasis partially supplied.]

The Initiation of This Proceeding, Its Trial and Judgment: This suit was instituted July 2, 1947, in the United States District Court for the Eastern District of Washington, Southern Division. That filing of the complaint in this cause was the culmination of more than forty years of effort by the representatives of the United States of America and of the Yakima Indian tribes to secure an adjudication of the respective rights of the Indians and the defendants or their predecessors in interest. As the exhibits in this case reveal, the Honorable Sam M. Driver now United States District Judge, but then United States Attorney at Spokane, Washington, emphasized the need of

³⁸ United States of America, Plaintiff's Exhibit 9—Hearing Before Committee on Indian Affairs, United States Senate, 76th Congress, 1st Session, S. 3998, a Bill approving and confirming contract for apportionment of water of Ahtanum Creek, Washington between Yakima Indian Reservation and lands north thereof dated May 9, 1908.

this adjudication.³⁹ Institution of the proceedings at that time was prevented by Senate Resolution 165 which is as follows: "In the Senate of the United States, July 18, 1939, Resolved, That the Attorney General is requested to stay proceedings for adjudication of the rights to the waters available for the irrigation of the Ahtanum Creek Valley in the State of Washington until such time as the Secretary of the Interior transmits to Congress a report upon a survey to be made by him with respect to the possible means and feasibility of supplementing the supply of water for irrigation of the irrigable lands in such valley."⁴⁰ The record is replete with evidence from 1906 to date revealing the insistence by the United States of America and the Yakima Tribe of Indians that the conflict between the Indians and the defendants or their predecessors in interest could be resolved only by an adjudication of their respective rights. At all times the Yakima Tribe of Indians has rejected the alleged agreement of 1908 and demanded that the United States of America fulfill its obligations to them by appropriate proceedings to protect their rights in Ahtanum Creek.⁴¹

A. Proceedings Preliminary to Trial: Prior to the decision now on appeal before this Honorable Court and in advance of trial, extensive conferences were

³⁹ United States of America, Plaintiff's Exhibit 11-114, letter of June 28, 1938. See also letter from Honorable Sam M. Driver dated September 24, 1938, United States of America, plaintiff's Exhibit 11-117.

⁴⁰ United States of America, plaintiff's Exhibit 11-127. See Appendix C, Exhibit 11-141.

⁴¹ United States of America, plaintiff's Exhibits 11-104, 11-105, 11-106, 11-107.

held with counsel for the defendants.⁴² There the issues in the cause were reviewed with court and counsel at great length. Based upon those conferences there was formulated the Pre-trial Order.⁴³ That Pre-trial Order was duly signed by the presiding judge, Honorable James Alger Fee, Judge of this Honorable Court. Preceding the signature of the trial judge, under the heading of "Conclusion" are these statements: (a) The Pre-trial Order was formulated in open court by counsel for the respective parties; (b) There are no other issues of law and fact except as embodied in the order.

B. Delivery of Exhibits by United States of America to Defendants—The Stipulation of Them Into the Record Without Objection: At the pre-trial conferences there were delivered to the defendants by the United States of America all of its exhibits. Those exhibits were retained in the office of counsel for the defendants for their examination and review. Counsel for the parties on May 24, 1951, two months prior to trial, "Stipulated and Agreed * * * that the exhibits [of the United States of America] * * * may be offered and admitted in evidence in this cause without objection from defendants above named."⁴⁴

C. The Trial: The exhibits of the United States of America were duly offered and received in evidence. Similarly the defendants offered their exhibits in evidence and they were received. Extensive oral evi-

⁴² R. 211, et seq.

⁴³ R. 123 et seq. Please refer to Appendices A, B and C which define with particularity the rights and interests of the United States of America.

⁴⁴ R. 99.

dence was adduced by both the United States of America and the defendants. Among other things the defendants introduced into the record the decree alluded to in the Pre-trial Order purporting to adjudicate the rights of the individual water users situated north of Ahtanum Creek.⁴⁵ The trial commenced on August 1, 1951.⁴⁶ At the conclusion of the case in chief of the United States of America the defendants proceeded to call their witnesses and to adduce evidence in support of their claims in the cause.⁴⁷

Both parties then rested.⁴⁸ Thereafter the court made an on-the-ground inspection of the lands of the defendants and of the Ahtanum Indian Irrigation Project within the Yakima Indian Reservation. It observed the ditches and canals of the respective parties.

Comprehensive briefs were filed in accordance with the court's direction.⁴⁹ The matter was fully argued based on the briefs thus filed.

D. Decision of the Court, Objections By the United States of America, The Findings of Fact and Conclusions of Law and Judgment:

March 9, 1953—The trial court filed its opinion in the case.

⁴⁵ R. 127, Pre-trial Order, Agreed Facts, paragraph 7, referring to the decree in the case entitled *State of Washington, Plaintiff v. Annie Wiley Achepohl et al., defendants in the Superior Court For Yakima County, State of Washington* (139 Wash. 84; 245 Pac. 758 (1926)).

⁴⁶ R. 364.

⁴⁷ R. 485 et seq.

⁴⁸ R. 567.

⁴⁹ R. 568 et seq.

April 13, 1953—The United States of America filed its motion to modify and clarify the opinion.

June 22, 1953—The United States of America requested a hearing on the motion for modification and clarification.

May 4, 1954—There was filed by the trial court “An Amendment to its Opinion of March 7, 1954.”

October 20, 1954—The United States Attorney was directed to contact the trial court in regard to the ultimate disposition of the cause.

November 9, 1954—The trial court entered its findings of fact, conclusions of law and judgment from which this appeal is taken.⁵⁰

A timely notice of appeal was filed by the United States of America on January 5, 1955.⁵¹

The Judgment of Dismissal: There was filed November 9, 1954, the Judgment of Dismissal in which the trial court declared: “It Is Hereby Ordered that the above entitled action and the complaint of the plaintiff herein [United States of America] be and the same is hereby dismissed on its merits.”⁵²

ASSIGNMENT OF ERRORS

The United States of America, Appellant, assigns the following errors in the records and proceedings in this case:

⁵⁰ See R. 167 et seq. See also *United States v. Ahtanum Irrigation District, et al.*, No. 312, 124 Fed. Supp. 818 (U. S. D. C. E. D. Wash. S. D., March 7, 1953; amended January 18, 1954; Supplemental Opinion January 18, 1954).

⁵¹ R. 199.

⁵² R. 166 and 167.

I. The Judgment of Dismissal cannot be sustained on the basis of the law, the pleadings, the pre-trial order, or the extensive oral and documentary evidence adduced in the trial on the merits of the case

a. The trial court erred in dismissing the complaint and the action in this cause because the United States of America fully stated a claim in its complaint; proved its rights to the use of water which it claimed and is entitled to the relief for which it prayed.⁵³

b. The trial court erred in failing to enter judgment in favor of the United States of America awarding to it a priority in Ahtanum Creek in favor of the Yakima Tribe of Indians ahead of all of the defendants by reason of the doctrine of implied reservation as established by the Supreme Court of the United States of America and consistently adhered to by this Honorable Court.⁵⁴

⁵³ See in that regard R. 161, Finding of Fact No. 5, that there was no reservation by the Yakima Tribe of Indians of rights to the use of water to irrigate its arid lands; Finding of Fact No. 6 that at the time of the signing of the Treaty there was no thought of irrigation; repeated statements throughout both the Findings of Fact and Conclusions of Law that in some manner the Yakima Indians could be deprived of water requisite to make their lands habitable. Error is likewise evident in the assertion that the United States had not proved that it was a trustee of rights to the use of water for the Yakima Indians; R. 164, 165, 166, Conclusions of Law Nos. 2, 3, 5, 6, 8, that the United States had not proved the right to any particular quantity of water for the Yakima Indians and that the United States had not proved the defendants were interfering with the rights to the use of water to which the Yakima Indians were entitled. **Throughout the decision of the court, 124 F. Supp. 818, the findings of fact and conclusions of law, which are clearly in error, are repeated and these assignments are applicable to them.**

⁵⁴ The assertions throughout the Findings of Fact and Conclusions of Law that the Yakima Tribe of Indians had not reserved

c. The trial court erred in declaring that the laws of the State of Washington apply to the rights to the use of water claimed by the United States of America in Ahtanum Creek on behalf of the Yakima Tribe of Indians.⁵⁵

II. The Judgment of Dismissal cannot be sustained because the United States of America is entitled to the relief for which it prayed

a. The trial court erred in dismissing the case because the alleged agreement of May 9, 1908, concerning which the United States of America sought declaratory relief is invalid and without force and effect as it purported to compromise litigation under the control of the Attorney General, who was not a party to the alleged agreement.⁵⁶

b. The trial court erred in dismissing the case because the subordinate officials of the Department of the Interior who executed the alleged agreement of 1908 were entirely without power or authority in their

rights to the use of water for the lands in question are contrary to the principles enunciated in *Winters v. United States*, 207 U. S. 564 (1908) and repeated decisions of this Court which are subsequently reviewed.

⁵⁵ R. 163, 164, Findings of Fact Nos. 15, 18 and R. 165, Conclusion of Law No. 7, that the United States of America was bound by the laws of the State of Washington in connection with the rights claimed on behalf of the Yakima Indians.

⁵⁶ Declaratory relief was requested in connection with the alleged agreement of May 9, 1908, alluded to in Findings of Fact Nos. 14, 15 and 18, Conclusions of Law No. 7, R. 162, 163, 165. Throughout, the trial court treats the agreement as binding upon the United States, whereas the United States asserts in the litigation that the alleged agreement of May 9, 1908, is null and void and of no force and effect. Thus a judgment of dismissal was clearly erroneous.

attempted grant to the defendants or their predecessors in interest of 75% of the flow of Ahtanum Creek.

c. The trial court erred in dismissing the case because the Congress refused to approve and the Indians have never at any time accepted the alleged agreement of May 9, 1908.

d. The trial court erred in dismissing the case because neither the United States of America nor the Yakima Tribe of Indians nor the defendants or their predecessors in interest have complied with the alleged agreement of 1908.

III. The Judgment of Dismissal may not be sustained by reason of the fact that it is predicated upon erroneous conclusions of law respecting the enforceability of a decree entered in a proceeding in a State court to which the United States of America was not a party

a. The trial court erred in declaring that the United States of America could be bound by the *Achepohl Decree* entered in the State court.⁵⁷

b. The trial court erred in stating that the United States of America had "encouraged" the adjudication from which emanated the *Achepohl* decree.⁵⁸

⁵⁷ R. 163, 164, Findings of Fact Nos. 15, 18, Conclusion of Law No. 7. The United States of America was not a party to the proceedings; had not waived its sovereign immunity from suit and could not have been bound by the decree in the state court.

⁵⁸ There is not a scintilla of evidence to support the conclusion that the United States of America encouraged the adjudication in the state court. See R. 163, Finding of Fact No. 15.

IV. The Judgment of Dismissal may not be sustained because it seeks to subject the Yakima Tribe of Indians, contrary to the laws of the State of Washington, to the laws of that State

a. The trial court erred by its judgment of dismissal as it permits the unconscionable waste of the waters of Ahtanum Creek by the defendants.⁵⁹

b. The trial court erred by its judgment of dismissal as it increased rather than dissipated the grounds of dispute.

ARGUMENT

Summary of Argument

Unconscionable waste of water by the defendants and irreparable damage to the Yakima Tribe of Indians by a half century of encroachments by those defendants underlie this cause. By the treaty of 1855 the Yakima Tribe of Indians ceded to the United States of America a large tract of land in the State of Washington and reserved a much smaller area bordered to the north by Ahtanum Creek. Before the Treaty in 1847 irrigation was practiced from Ahtanum Creek by the Indians and the Missionaries. The lands are not habitable without irrigation. Under the doctrine of the *Winters* (207 U. S. 564) case there is an implied reservation for the lands of the Ahtanum Indian Irrigation Project within the Yakima Reservation. The trial court has denied the principles of the *Winters* doctrine and has dismissed the case and the complaint. That dismissal is entirely unjustified and may not be supported by reason of (a)

⁵⁹ R. 471, 472, Testimony of George Sargent.

the agreed facts in the Pre-trial Order; (b) the introduction of every element of proof required to establish the rights to the use of water of the Yakima Tribe of Indians in Ahtanum Creek. Moreover, the United States of America requested on behalf of the Yakima Tribe of Indians that an illegal agreement of May 9, 1908 entered into by unauthorized subordinate officials of the Department of the Interior be declared null and void and of no force and effect.

Plain and serious error was likewise made by the trial court in declaring that the laws of the state of Washington governed. That conclusion being contrary to the Enabling Act and Constitution of the State of Washington and decisions of the Supreme Court of the United States.

A dismissal under the circumstances, the case having been fully tried and proved on the merits, is a manifest injustice and cannot be sustained by the facts or the law.

Both the law and facts entitle the United States of America to judgment in this case

This Honorable Court is respectfully petitioned to consider, at the outset, the undisputed and unchallenged facts of this case. Those facts are [1] agreed to by the parties;⁶⁰ [2] proved by the evidence.⁶¹

Proved beyond question are these unassailable facts:

⁶⁰ R. 123, Please refer to Pre-trial Order, Agreed Facts, and Appendices A, B, and C.

⁶¹ R. 99, Stipulation admitting without objection the exhibits of the United States of America.

1. Title to the lands in the Ahtanum Indian Irrigation Project was reserved by the Yakima Tribe of Indians.⁶²

2. The lands have been allotted to individual Indians.⁶³

3. These lands are semiarid and may be successfully cultivated only by irrigation from Ahtanum Creek.⁶⁴

4. Ahtanum Creek is the cradle of irrigation in the State of Washington, being practiced by the Indians in the year 1847, prior to the Treaty of 1855.⁶⁵

5. Soil survey proves the irrigated and irrigable lands.⁶⁶

6. These exhibits, maps of the area in question, reveal—[a] Ahtanum Irrigation System ownership south [Indian] side of Ahtanum Creek;⁶⁷ [b] Development of Ahtanum Indian Irrigation Project System;⁶⁸ [c] Irrigable lands in Ahtanum Indian Irrigation Project served by Ahtanum Creek.⁶⁹

7. Proved and likewise agreed upon among the parties are these conclusive facts respecting the

⁶² R. 123, Pre-trial Order, Agreed Facts, paragraph 1; See also *supra*, page 7 where exhibits proving title are chronicled.

⁶³ R. 124, Pre-trial Order, Agreed Facts, paragraph 9; See also United States of America plaintiff's exhibits 2-a-1 et seq.; 3a et seq.; 4b, c, d.

⁶⁴ R. 124, Agreed Facts, paragraphs 2 and 4.

⁶⁵ See *supra*, page 4.

⁶⁶ United States of America, plaintiff's exhibit 7; see also United States of America, plaintiff's exhibit 5a, disclosing location of allotments and ditches from which delivery is made.

⁶⁷ United States of America, plaintiff's Exhibit 5a.

⁶⁸ United States of America, plaintiff's Exhibit 5b.

⁶⁹ United States of America, plaintiff's Exhibit 5d.

claimed rights to the use of water of the United States of America in Ahtanum Creek which are asserted on behalf of the Yakima Indians.

*Appendix A of this Brief Discloses:*⁷⁰ Land allotment to Indian, number; ditch serving land; dates when water was first delivered to allotment; point of diversion from ditch; for each tract of allotted land [a] the irrigated acreage, [b] irrigable acreage.

The main canal and the lower canal are the principal structures of the Ahtanum Indian Irrigation Project. Water is now and has been diverted from Ahtanum Creek since completion of those ditches in 1915 to irrigate the Indian allotment lands set forth in Appendix A of this brief, which is reviewed in the paragraph immediately preceding. Those two main canals and the smaller canals are described with particularity in the Pre-trial Order under Agreed Facts.⁷¹ Locations of those canals and the diversion works for each allotment have likewise been proved by maps and oral testimony.⁷²

*Appendix B of this Brief Discloses:*⁷³ “Stream Flow South Fork Ahtanum Creek” and “Stream Flow North Fork Ahtanum Creek” during each month of the irrigation season. Likewise disclosed by Appendix B are “Stream Flows and Canal Diversions

⁷⁰ Appendix A of Pre-trial Order; United States of America, plaintiff's Exhibit 4-e; See also R. 127, Pre-trial Order, Agreed Facts, paragraph 6.

⁷¹ R. 125, 126, 127.

⁷² R. 441, Testimony of Paul F. Henderson.

⁷³ Pre-trial Order, Appendix B; United States of America, plaintiff's Exhibit 4-e; See paragraph 12, Pre-trial Order, Agreed Facts, R. 129.

Ahtanum Irrigation System Yakima Indian Reservation," setting forth [a] the year; [b] the total irrigated acreage of the Ahtanum Indian Irrigation Project; [c] the total flow in acre-feet of Ahtanum Creek each month of the irrigation season; [d] the total diversion each month of the irrigation season by the Ahtanum Indian Irrigation Project; [e] the percentage of the total stream flow diverted from Ahtanum Creek each month of the irrigation season and utilized upon the Ahtanum Indian Irrigation Project.⁷⁴ The continued and irreparable damage by reason of the shortage of water properly to irrigate the lands of the Yakima Indians has likewise been disclosed.⁷⁵

The Claims of Defendants: At the trial the defendants adduced evidence of their claimed rights to the use of water.⁷⁶ Similarly by oral testimony they attempted to prove the diversion of water from Ahtanum Creek and application of it for purposes of irrigation.⁷⁷

The Controversy, Actual, Protracted and Contentious: Few controversies over rights to the use of water have been more bitter, contentious and protracted than the struggle between the Yakima Indians and the defendants or their predecessors in interest

⁷⁴ R. 129.

⁷⁵ Please refer to testimony of Paul F. Henderson, *supra*, page 8, R. 441.

⁷⁶ Defendants' Exhibit 139, the decree in the case of *State of Washington v. Annie Wiley Achepohl, et al., defendants*, 139 Wash. 84; 245 Pac. 758 (1926).

⁷⁷ R. 486, testimony of the President of the Board of Directors of Ahtanum Irrigation District.

over the waters of Ahtanum Creek, unabated since 1906 when *Munn v. Redman* was initiated.⁷⁸ Reference in regard to this conflict is made to Appendix C of this brief. There are listed one hundred and forty-six exhibits disclosing the unending struggle of the United States of America and the Yakima Indians to protect the rights to the use of water claimed by them in Ahtanum Creek.⁷⁹ Though the content of each exhibit there listed is set forth, an examination of the exhibits themselves will reveal the repeated efforts of the United States of America to initiate these proceedings and the measures adopted by defendants or their predecessors to prevent the trial of it. Over a quarter of a century ago the resort to firearms by the Indians to protect their rights was deemed essential.⁸⁰

Recognition of the existence of the controversy but not reflective of the inflammatory character of it, as proved by the exhibits alluded to above, is this statement from the Agreed Facts in the Pre-trial Order: "There are not sufficient waters in Ahtanum Creek to irrigate lands on both sides of said creek now being partially irrigated from that source."⁸¹

Declaratory relief respecting the validity of the alleged agreement of May 9, 1908, was prayed for by the United States in addition to the petition for a

⁷⁸ See *supra*, page 9.

⁷⁹ United States of America, plaintiff's Exhibits Nos. 11-1 through 11-146, Appendix C.

⁸⁰ R. 470, Testimony of George Sargent.

⁸¹ R. 129, Pre-trial Order, Agreed Facts, paragraph 11.

decree quieting its title to rights to the use of water in Ahtanum Creek.⁸²

A. Judgment of dismissal is plain and serious error—cannot be supported

A more contentious controversy needing resolution is difficult to perceive—yet after a full trial on the merits the court below ordered “the above entitled action and the complaint * * * is hereby dismissed on its merits.”⁸³ How may such a Judgment of Dismissal be sustained? That it may not be sustained is disclosed in the paragraphs which follow.

The Congress Is Charged by the Constitution to Protect the Rights of the Indians: There resides with the United States of America a fiduciary obligation stemming from the Constitution to protect the Indians.⁸⁴ Recently the highest Court made this statement: “* * * this Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people. * * * In carrying out its obligations with the Indian tribes, the Government is something more than a mere contracting party. * * * it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the

⁸² Please refer in that regard to R. 12, paragraph XIII of the complaint, and appendix; See also R. 26, Exhibit B of complaint.

⁸³ R. 167.

⁸⁴ Constitution of the United States, Article I, Section 8, Clause 3; *United States v. 43 Gallons of Whisky, etc.*, 93 U. S. 188, 194 (1876); *Cherokee Nation v. Georgia*, 30 U. S. 1, 17 (1831).

most exacting fiduciary standards.”⁸⁵ Earlier the same Court had made this pronouncement in regard to that relationship with the Indian tribes: “* * * although the United States always had legal title to the land and power to control and manage the affairs of the Indians, it did not have power to give to others or to appropriate to its own use any part of the land without rendering, or assuming the obligation to pay, just compensation to the tribe, for that would be, not the exercise of guardianship or management, but confiscation.”⁸⁶ Thus the historical concept of the relationship between the United States and the Indians as first expressed by Chief Justice Marshall has been adhered to consistently since its pronouncement.

The Attorney General of the United States Is Required to Represent the Indians in Proceedings of This Character: By statute there resides with the Attorney General of the United States and the United States Attorneys the obligation to represent the Indians in proceedings of the nature here involved.⁸⁷ Reference in that connection is made to the complaint⁸⁸ and the Pre-trial Order.⁸⁹ On repeated occasions this Honorable Court has entertained appeals in which the United States of America appeared, as here, to defend rights to the use of water reserved by

⁸⁵ *Seminole Nation v. United States*, 316 U. S. 286, 296-297 (1941).

⁸⁶ *United States v. Shoshone Tribe of Indians*, 304 U. S. 111, 115-116 (1938).

⁸⁷ 25 U. S. C. 175; Please refer to 5 U. S. C. 311 and Reorganization Plan No. 2.

⁸⁸ R. 1 et seq.

⁸⁹ R. 123 et seq.

the Indians or which were reserved for them by the United States of America.⁹⁰

The Trial Court Had Jurisdiction: It is specifically provided that the United States district courts shall have "original jurisdiction of all civil actions, suits or proceedings commenced by the United States, * * *." ⁹¹ Similarly it is provided that "In a case of actual controversy within its jurisdiction, * * * any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, * * *." ⁹² From the cases which have been cited and those which follow, it is eminently clear that the Federal courts have jurisdiction to [1] adjudicate rights to the use of water claimed and exercised by the United States of America; [2] entertain proceedings for declaratory relief, as in this case, in which the validity of the agreement of May 9, 1908, is attacked.

Every Fact Has Been Alleged and Proved Which Entitles the United States of America to a Decree Quieting Its Title to the Rights to the Use of Water in Ahtanum Creek for a Judgment Declaring the Agreement of May 9, 1908, Null and Void: Ignored

⁹⁰ *Winters v. United States*, 207 U. S. 564 (1908), affirming this Court, 143 Fed. 740; 148 Fed. 684. *United States v. Powers*, 305 U. S. 527 (1939), affirming this Court 94 F. 2d 783. *United States v. Walker River Irrigation District, et al.*, 104 F. 2d 334 (C. A. 9, 1939). *Conrad Investment Co. v. United States*, 161 Fed. 829 (C. A. 9, 1908). *United States v. McIntire*, 101 F. 2d 650 (C. A. 9, 1939). *Skeem v. United States*, 273 Fed. 93 (C. A. 9, 1921).

⁹¹ 28 U. S. C. 1345, formerly 28 U. S. C. 41 (1).

⁹² 28 U. S. C. 2201.

by the trial court is the fact that "Many suits have been allowed to quiet title to water rights, as to other property."⁹³ That is the principal relief sought here by the United States of America. In seeking that relief there has been adherence to established practice and procedure. A review of the complaint will reveal the sufficiency of the allegations to state a claim for the relief in question. That statement is predicated upon the decisions of the Supreme Court of the United States of America and of Washington's highest court.⁹⁴ The Washington court has recognized the sufficiency of a pleading where "The complainant * * * alleged ownership * * * of the first right to divert water. * * * it challenged the defendants to set up any claims they had against such rights. In actions to quiet title to real estate, where such general allegations of ownership are made, it is undoubtedly the duty of a defendant to set up any claim he may have of either a legal or equitable nature, * * *."⁹⁵

In another leading case in the State of Washington this statement has been made: "The theory of the complaint is to quiet the title of contending claimants for the use of the waters of Stemilt Creek. * * * The allegations in the complaint of ownership of the right

⁹³ 1 *Wiel Water Rights in the Western States*, 3d ed., Sec. 654, page 726; 2 *Kinney on Irrigation and Water Rights*, 2d ed., page 1330.

⁹⁴ *Ely v. New Mexico & Arizona RR. Co.*, 129 U. S. 291 (1889); *Spring Hill Irr. Co. v. Lake Irr. Co.*, 42 Wash. 379, 382, 85 Pac. 6, 7 (1906).

⁹⁵ *Spring Hill Irr. Co. v. Lake Irr. Co.*, 42 Wash. 379, 382, 85 Pac. 6, 7 (1906).

to the use of water is sufficient.”⁹⁶ A similar view has been expressed in another decision from the State of Washington.⁹⁷

Far more important, however, than the allegations of the complaint is the fact that the United States of America and the defendants here approved, and the court entered, a Pre-trial Order pursuant to which the case proceeded. That Pre-trial Order which this Honorable Court is respectfully requested to review in detail, sets forth succinctly the agreed facts and the contentions of the parties in a manner which entitled the United States of America to judgment rather than dismissal. This Court has, of course, recognized the propriety of quiet title proceedings in regard to rights to the use of water.⁹⁸ Thus to dismiss the case in view of the complaint, the Pre-trial Order and the proved facts is contrary to the sound and basic principles of justice.

It is difficult to perceive any basis whatever for the dismissal of the complaint in regard to the quiet title aspects of the cause. Similarly in view of the actual contentious, protracted controversy, in regard to the alleged agreement of 1908, it is impossible to reconcile the dismissal by the trial court of this cause with the numerous authorities directly in opposition to such a disposal of the matter. Those decisions are subsequently reviewed.

⁹⁶ *Miller v. Lake Irrigation Co.*, 27 Wash. 447, 448, 67 Pac. 996, 997 (1902).

⁹⁷ *Rogers v. Miller*, 13 Wash. 82, 84, 42 Pac. 525, 526 (1902).

⁹⁸ *Vineyard Land & Stock Co. v. Twin Falls Oakley Land & Water Co.*, 245 Fed. 30 (C. A. 9, 1917).

B. The invalidity of the alleged agreement of May 9, 1908, should have been declared as prayed by the United States of America

Both in the complaint and the Pre-trial Order reference is made by the United States of America to the alleged agreement of May 9, 1908, and its validity denied.⁹⁹ Emphasized both in the pleadings and the Pre-trial Order is the fact that subordinate officials of the Department of the Interior could not [1] settle by compromise the case of *Munn v. Redman*, the Attorney General alone would have that power;¹⁰⁰ [2] no official could relinquish, as was attempted by the illegal agreement of May 9, 1908, 75% of the natural flow of Ahtanum Creek.¹⁰¹

This salient factor in regard to [1] and [2] must be emphasized:

Congress after extensive hearings refused to enact legislation sponsored by defendants to ratify the illegal agreement of May 9, 1908.¹⁰²

Declaratory relief of the character sought by the United States of America is in accordance with established practice;¹⁰³ a denial of that relief by the trial court is a manifest injustice.

⁹⁹ R. 13, Complaint, paragraph XIII; R. 131, Pre-trial Order, Par. 7.

¹⁰⁰ See *infra*, page 43, for authorities.

¹⁰¹ See *infra*, page 43, for authorities.

¹⁰² See United States of America, plaintiff's Exhibit 9; *Supra* page 11.

¹⁰³ Wiel, Water Rights in the Western States, 3d ed., vol. 1, p. 728, Sec. 654; p. 859, sec. 802. *City of Los Angeles v. City of Glendale*, 23 Cal. 2d 68, 142 P. 2d 289 (1943); *San Diego v. Cuyamaca Water Co.*, 209 Cal. 105, 287 Pac. 475, 496 (1930).

Likewise to be noted is this additional fact respecting the alleged agreement of May 9, 1908: Though the trial court appears to recognize that the apportionment of 75% of the waters to the defendants and 25% of the waters to the Yakima Indians was on the basis of the lands presently irrigated, the fact is to the contrary. The unauthorized attempt to apportion the water by the alleged agreement of 1908 was on the basis of the Indians irrigating 1,200 acres and the defendants approximately 4,000. At the present time of course, the Indians are irrigating to the extent that water is available, up to 5,000 acres and the water users north of the stream are irrigating up to approximately 10,000 acres. Manifestly, therefore, the apportionment which was attempted could have no bearing on the acreages over and above those which were irrigated at the time of the apportionment. It is eminently clear from an examination of the document itself that the attempted apportionment was on the basis of the situation which then existed.¹⁰⁴

At this juncture it is essential to allude to the plain and serious error on the part of the trial court in its decision and findings of fact and conclusions of law in denying the applicability of the *Winters Doctrine*.¹⁰⁵

The Decision, Findings of Fact, Conclusions of Law, and Judgment Are Contrary to the Decisions of the Supreme Court of the United States of America and This Honorable Court: It is respectfully submitted that the facts of this case bring the proceedings

¹⁰⁴ R. 429, Testimony of John H. Lynch. See R. 128, Pre-trial Order, Agreed Facts, paragraph 10.

¹⁰⁵ 207 U. S. 564 (1908).

squarely within the doctrine enunciated by the *Winters* case.¹⁰⁶ In that case there had been reserved by the Indians in their treaty with the United States a smaller tract out of a much larger area originally claimed by them. The lands were in an arid region. Farming could not be successfully practiced without irrigation though the objective was to turn the Indians from their nomadic way of life to one of farming. Bordering that reservation was the Milk River. White settlers had claims to rights to the use of water from the stream in question pursuant to the laws of the State of Montana. Presented was the question of the respective rights to the use of water from the Milk River. On the subject, sustaining the claim of the Indians, the highest Court declared: "The reservation was a part of a very much larger tract which the Indians had the right to occupy and use and which was adequate for the habits and wants of a nomadic and uncivilized people. It was the policy of the Government, it was the desire of the Indians, to change those habits and to become a pastoral and civilized people. * * * The lands were arid and, without irrigation, were practically valueless. And yet, it is contended, the means of irrigation were deliberately given up by the Indians and deliberately accepted by the Government."¹⁰⁷ Then the highest Court denied the contention that the United States had intended to place the Indians on lands not fit

¹⁰⁶ 207 U. S. 564 (1908).

¹⁰⁴ R. 429, Testimony of John H. Lynch. See R. 128, Pre trial

¹⁰⁷ *Winters v. United States*, 207 U. S. 564, 576 (1908).

for habitation without rights to the use of water or that subsequent to the treaty had in some manner so deprived them of those rights. These terms were used by the Court: "The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. *The United States v. The Rio Grande Ditch & Irrigation Co.*, 174 U. S. 690, 702; *United States v. Winans*, 198 U. S. 371. That the Government did reserve them we have decided, and for a use which would be necessarily continued through years." ¹⁰⁸

In affirming this Court in that decision there was proclaimed the doctrine of implied reservation of rights to the use of water from streams within or bordering upon Indian reservations in the arid West. That tenet of the law reflects a practical, a humane attitude, followed by the courts in numerous cases identical with that now before this Court. Using virtually the same terminology as that of the Supreme Court, this Honorable Court in a case involving the same questions as here presented, stated: "The lands within these reservations are dry and arid, and require the diversion of waters from the streams to make them productive and suitable for agricultural, stock raising, and domestic purposes. What amount of water will be required for these purposes may not be determined with absolute accuracy at this time; but the policy of the government to reserve whatever water of Birch creek may be reasonably necessary, not only for present uses, but for future requirements, is clearly within

¹⁰⁸ *Winters v. United States*, 207 U. S. 564, 577 (1908).

the terms of the treaties as construed by the Supreme Court in the *Winters* Case.”¹⁰⁹

Another highly important and significant case arose in connection with rights to the use of water for the Indians of the Walker River Indian Reservation. That reservation was established by departmental action.¹¹⁰ There the court had before it the many factors which are here presented. Having accorded those facts a most deliberate consideration, it determined that when the Indian reservation in question was established certain water was reserved on behalf of the Indians from the stream involved. On the subject this statement was made: “In the *Winters* case, as in this, the basic question for determination was one of intent—whether the waters of the stream were intended to be reserved for the use of the Indians, or whether the lands only were reserved.” Continuing, the court stated: “The intention had to be arrived at by taking account of the circumstances, the situation and needs of the Indians and the purpose for which the lands had been reserved.” Further, the court stated: “We turn now to the circumstances under which the Walker River Indian Reservation was set aside.” This Honorable Court then pointed out that cultivation of portions of the reservation was early commenced and water for irrigation purposes diverted from the stream. There was: “The gradual but substantial growth of the practice

¹⁰⁹ *Conrad Investment Co. v. United States*, 161 Fed. 829, 832 (C. A. 9, 1908).

¹¹⁰ *United States v. Walker River Irrigation Dist., et al.*, 104 F. 2d 334 (C. A. 9, 1939).

of farming and irrigation on the reservation * * *. * * * The necessity of having a water supply if any crops were to be produced on the reservation was known to the Department. It would be irrational to assume that the intent was merely to set aside the arid soil without reserving the means of rendering it productive." Premised upon those known factors, the court declared: "We hold that there was an implied reservation of water to the extent reasonably necessary to supply the needs of the Indians."¹¹¹

Departure by the trial court from the doctrine of implied reservation as recognized in the *Winters* case presents to this Court for resolution a grievous injustice against the Yakima Tribe of Indians. The United States of America would not be a party to a treaty and this Court and the highest Court have so held, which would strip the Indians of the vast area they once owned and restrict them to the semiarid lands they now occupy without assuring them a water supply of the character which they here claim. It was plain and serious error for the trial court to depart as it has departed both in its findings of fact, conclusions of law and decision, from the basic doctrine of the *Winters* case which guarantees to the Indians a supply of water pursuant to which they would be able to provide themselves with a home and abiding place as was contemplated by the Treaty. It is abundantly manifest, therefore, that the long-established principle of the law adhered to by this Court and the Supreme Court in innumerable cases

¹¹¹ *United States v. Walker River Irrigation District, et al.*, 104 F. 2d 334, 337, 338 and 339 (C. A. 9, 1939).

should be applied and the decision and judgment of the lower court reversed.¹¹²

Errors, plain, serious and reversible in character, were made by the Trial Court both in law and fact

In the succeeding paragraphs the basic errors of the trial court are reviewed.

The Trial Court Erred in Stating that Ahtanum Creek Is Not Included in the Yakima Indian Reservation: A more basic error than the trial court's declaration that "the north boundary of said Reservation ran along Ahtanum Creek but did not include said stream" may not be perceived.¹¹³ The trial court recognizes that Ahtanum Creek is the northern boundary of the reservation in question. It is so provided in the Treaty.¹¹⁴ Under those circumstances, according to the principles enunciated by Vattel, in the Law of Nations the least the Yakima Tribe was entitled to claim is to the thread of that stream.¹¹⁵ That most certainly is the rule between individuals. The highest Court has stated: "Proprietors, bordering on streams not navigable, unless restricted by the terms of their

¹¹² *Winters v. United States*, 207 U. S. 564 (1908), affirming this Court, 143 Fed. 740; 148 Fed. 684. *United States v. Powers*, 305 U. S. 527 (1939), affirming this Court 94 F. 2d 783. *United States v. Walker River Irrigation District, et al.*, 104 F. 2d 334 (C. A. 9, 1939). *Conrad Investment Co. v. United States*, 161 Fed. 829 (C. A. 9, 1908). *United States v. McIntire*, 101 F. 2d 650 (C. A. 9, 1939). *Skeem v. United States*, 273 Fed. 93 (C. A. 9, 1921).

¹¹³ R. 160, Finding of Fact No. 3.

¹¹⁴ R. 18, Treaty of 1855, Article 2.

¹¹⁵ Laws of Nations, Vattel, 1859, page 120.

grant, hold to the centre of the stream; * * *.”¹¹⁶ In regard to the subject this emphatic statement was taken from a recent decision of the Supreme Court of the State in which Ahtanum Creek flows: “*The boundary line of a nonnavigable stream is, in Washington law, the thread of the stream.*”¹¹⁷ [Emphasis supplied.]

The error of the trial court is patent in that regard. Equally contrary to the finding of fact alluded to and diametrically opposed to the trial court’s finding is this statement from that court’s decision: “Here, in accordance with previous decisions, we decide that there was a reservation of the use of some waters of the Ahtanum.”¹¹⁸ Those two totally incompatible statements by the trial court may not stand, it is respectfully submitted. That error nevertheless pervades the findings of fact, conclusions of law, judgment and decision of the trial court.

*The Court Erroneously Attaches Significance to the Fact That Some of the Waters of Ahtanum Creek Rise Outside of the Reservation:*¹¹⁹ There is no basis for attaching significance to the fact that the source of some of the waters of Ahtanum Creek flow from streams outside of the Reservation. That fact prevailed in connection with other cases in which the doctrine of implied reservation has been applied by

¹¹⁶ *Railroad Co. v. Schurmeir*, 74 U. S. 272, 287 (1868).

¹¹⁷ *Hirt v. Entus*, 37 Wash. 2d 418, 428, 224 P. 2d 620, 626 (1950).

¹¹⁸ *United States v. Ahtanum Irrigation District, et al.*, 124 F. Supp. 818, 831 (U. S. D. C. E. D. Wash. S. D. 1954).

¹¹⁹ R 161, Finding of Fact No. 4; *United States v. Ahtanum Irrigation District, et al.*, 124 F. Supp. 818, 831.

this Court.¹²⁰ A different rule would be clearly destructive of the rights to the use of water reserved by the Indians when they relinquished the vast areas included in the Treaty of 1855 and restricted themselves to the much smaller area bordered on the north by Ahthanum Creek.

*The Trial Court Erred in Declaring There Was No Reservation by the Treaty of 1855 "either express or implied":*¹²¹ The error of the trial court is evidenced by the facts reviewed above and the repeated decisions of this Honorable Court and the Supreme Court in connection with identical factual situations.¹²²

*The Trial Court Erred when it Declared That "defendants owning land north of the Ahtanum have not infringed upon any water rights of the United States, the Confederated Tribes, or individual Indians under the proof herein":*¹²³ "Clearly in error" is the only appropriate description that may be made of that statement by the trial court in its findings. An examination of Appendix C of this brief discloses a continuous and ever contentious struggle since 1906 between the Yakima Tribes of Indians and the defendant water users north of Ahtanum Creek. Armed guards were placed by the Indians a quarter of a century ago to protect the waters which they claimed

¹²⁰ *Conrad Investment Co. v. United States*, 161 Fed. 829 (C. A. 9, 1908). *Winters v. United States*, 207 U. S. 564 (1908); affirming this Court, 143 Fed. 740; 148 Fed. 684.

¹²¹ R. 161, Finding of Fact No. 5.

¹²² See *supra*, page 37, footnote 112.

¹²³ R. 161, Finding of Fact No. 5.

and to prevent the diversion of those waters by the defendants who had constructed a dam and thus were taking all of the waters of the stream in question.¹²⁴ There is today pending in the trial court a "Petition for an Injunction Pending Appeal" filed by defendants here, in which the conflict between the defendants and the Yakima Tribe of Indians is clearly defined. In that proceeding it is asserted that the Indians have diverted 1,000 acre-feet of water in excess of their rights in Ahtanum Creek. Thus on the basis of the facts reviewed in this case, of the record—and even of the opinion itself written by the trial court—it is impossible to support the conclusion referred to in this paragraph.¹²⁵

*The Trial Court Erred in Stating That at the Time "of the signing of the Treaty of 1855 there was little or no thought of irrigation or the use of water for irrigation purposes":*¹²⁶ "Clearly erroneous" is the only appropriate designation of that conclusion. As pointed out above, one of the attorneys for the defendants has described Ahtanum Creek as the "cradle and proving ground of irrigation in the State of Washington." As disclosed in the factual statements above, waters were diverted from Ahtanum Creek and utilized by the Indians in the year 1847, prior to the Treaty of 1855.¹²⁷ Water was essential successfully to

¹²⁴ R. 470, Testimony of George Sargent, United States of America, plaintiff's witness.

¹²⁵ See factual review respecting conflict, page 9.

¹²⁶ R. 161, Finding of Fact No. 6.

¹²⁷ See *supra*, page 4, United States of America, plaintiff's Exhibit 12, Yakima Valley Catholic Centennial, The Beginning of Irrigation in the State of Washington.

farm those arid lands; that fact was known then. It is known now. This Court and the highest Court have declared that our Nation would not force the Indians onto arid lands and then deprive them of water as is attempted here.

*The Trial Court Erred in Declaring That the United States "has no rights in virtue of its sovereignty":*¹²⁸ That statement is contradictory of Findings No. 3, No. 10 and No. 11. The United States of America by the Constitutional principles long recognized by the highest Court and this Honorable Court, has rights as a sovereign in Ahtanum Creek in a fiduciary obligation to protect the rights to the use of water of the Indians.¹²⁹

*The Trial Court Erred in Declaring That the United States "as sovereign and as owner recognized appropriation and beneficial use as the sole method of acquisition of water rights in this area":*¹³⁰ The statement of the trial court just quoted is contrary to the laws of the State of Washington.¹³¹ There the riparian doctrine is specifically recognized. It is likewise contrary to the principles enunciated by the Supreme Court of the United States.¹³² There the Court declared that the Acts of 1866, 1870 and the Desert Land Act of 1877,¹³³ have no application to reserved lands of

¹²⁸ R. 161, Finding of Fact No. 7.

¹²⁹ See *supra*, page 26, "The Congress is charged by the Constitution to protect the rights of the Indians."

¹³⁰ R. 161, Finding of Fact No. 8.

¹³¹ *Benton v. Johncox*, 17 Wash. 277, 49 Pac. 495 (1897).

¹³² *Federal Power Commission v. State of Oregon*, 349 U. S. 435 (1955).

¹³³ 43 U. S. C. 321; 661.

the character here involved. The conclusion is likewise contrary to the doctrine of the *Winters* case. There under precisely the same facts which prevail in this case it is declared that rights to the use of water were impliedly reserved from streams bordering or traversing Indian reservations in the arid West.

*The Trial Court Erred in Declaring That "the State of Washington has prescribed appropriation and beneficial use as the method of acquiring water rights in this area":*¹³⁴ The conclusion of law expressed in the finding is clearly erroneous. It was specifically prescribed in the Enabling Act pursuant to which the State of Washington joined the Union; expressly declared in the Constitution of that State that "Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States, * * *."¹³⁵ Respecting identical provisions in regard to the State of Montana this Court has declared unequivocally that the State laws regarding the appropriation and use of rights to the use of water have no application within Indian reservations.¹³⁶

*The Trial Court Erred in Declaring That "the United States by administrative, executive and legislative action has confirmed the rights of defendants * * * to lands and water rights outside the Yakima Indian Reservation, and by administrative, executive and legislative action has confined lands within the Yakima Indian Reservation not yet pat-*

¹³⁴ R. 162, Finding of Fact No. 12.

¹³⁵ See Enabling Act, Section 4, Second subdivision; Constitution of the State of Washington, Article XXVI, Second subdivision.

¹³⁶ *United States v. McIntire*, 101 F. 2d 650 (C. A. 9, 1939).

ented to the use of water which these presently received":¹³⁷ There is not a scintilla of evidence to support that conclusion nor a single authority to sustain it. To the contrary, as is reflected by Appendix C of this brief, there has been a continuous effort on the part of the executive branch of the Government to protect the rights of the Yakima Indians in Ahtanum Creek.

*The Trial Court Erred in Declaring That the United States of America Had Entered Into the Agreement of May 9, 1908, Purporting to Give Away to Defendants 75% of the Natural Flow of Ahtanum Creek and Reserving 25% of It to the Yakima Tribe of Indians:*¹³⁸ The finding alluded to here is incorrect both in fact and law. *Munn v. Redman*¹³⁹ instituted in 1906, was the first case involving the subject matter of this litigation. Subordinate officials of the Department of the Interior attempted to settle it by compromise. Few principles of law are more basic than that the Attorney General of the United States is the only one empowered to represent the United States in litigation and to compromise suits of the character here involved.¹⁴⁰ That official did not and could not in equity and good conscience compromise it in that manner. Efforts by the subordinate officials of the Department of the Interior to usurp the powers of the Attorney General

¹³⁷ R. 162, Finding of Fact No. 13.

¹³⁸ R. 162, Finding of Fact No. 14.

¹³⁹ See page 9, *supra*.

¹⁴⁰ 5 U. S. C. 291; 5 U. S. C. 303, 310; 25 U. S. C. 175. 22 O. A. G. 491, 494 (1899). 23 O. A. G. 507, 508 (1901). Confiscation Cases, 74 U. S. 454, 458, 459 (1868). See also 81 A. L. R. 128 and cases cited. 43 Am. Jur., Public Officers, sec. 249; sec. 256.

and to settle *Munn v. Redman* by giving 75% of the water to defendants can be described only as abortive. Equally clear is the fact that the attempt by the officials of the Department of the Interior to give away 75% of Ahtanum Creek was undertaken wholly without authority,¹⁴¹ and as pointed out by the Supreme Court, "an extinguishment [of property rights] cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards."¹⁴² The agreement of being "* * * not the exercise of guardianship or May 9, 1908, is aptly described in these terms as management, but confiscation."¹⁴³

Recognizing the Invalidity of the Agreement of May 9, 1908, Defendants Sponsored Legislation in Congress to Secure Approval of it: Congress refused to enact it.¹⁴⁴ Equally important is the fact that the United States of America has consistently diverted in excess of 25% of the stream flow of Ahtanum Creek. To be noted likewise is the fact that the alleged agreement of May 9, 1908, required the defendants to install headgates and measuring devices which they have not done.¹⁴⁵ Rather than installing headgates, defendants have at all times followed wasteful practices, allowing the water to run from

¹⁴¹ *United States v. Shoshone Tribe of Indians*, 304 U. S. 111, 115, 116 (1938).

¹⁴² *United States v. Santa Fe Pacific R. Co.*, 314 U. S. 339, 354 (1941).

¹⁴³ *United States v. Shoshone Tribe of Indians*, 304 U. S. 111, 116 (1938).

¹⁴⁴ See *supra*, page 11; United States of America, Plaintiff's Exhibit 9.

¹⁴⁵ See Appendix B of Complaint, R. 29, Article 5.

Ahtanum Creek freely and without control into their ditches.¹⁴⁶ To be observed from the testimony alluded to: Neither the United States of America nor the defendants have ever complied with the abortive agreement of May 9, 1908.

*The Trial Court Erred in Stating That the United States of America "encouraged" the Adjudication of the Rights to the Use of Water of the Defendants:*¹⁴⁷ There is not a scintilla of evidence to support that conclusion. To be observed from Appendix C and the exhibits alluded to in that Appendix, the United States of America has at all times denied that it was in any way bound by the State court decree.

*The Trial Court Erred Both in Law and in Fact in Declaring That the United States of America "has not proved possession of any portion of the flow of any water of Ahtanum Creek as appurtenant to any parcel of real property" and "has failed to prove that any portion of the water now used on the north side of Ahtanum Creek was ever used upon Reservation lands from the time of the Treaty of 1855 up to the present time:"*¹⁴⁸ Throughout, the trial court has

¹⁴⁶ R. 505, Testimony of defendants' witness J. R. Rutherford; R. 471 testimony of United States of America, plaintiff's witness George Sargent; R. 509, Testimony of defendants' witness E. J. Shockley.

¹⁴⁷ R. 163, Finding of Fact No. 15.

¹⁴⁸ R. 163, Finding of Fact No. 17. See also the statement in the decision *United States v. Ahtanum Irrigation District, et al.*, 124 F. Supp. 818, 827: "The Government had the burden of establishing either that the Indian wards had had possession of the water right and had been ousted recently by the defendants or that these wards had title thereto and, as a result, the right to immediate possession."

failed to distinguish between the "corpus" of the water and the "usufructuary" rights to the use of water. In this cause the United States of America on behalf of the Yakima Tribe of Indians seeks to quiet its title to the "usufructuary right," an interest in real property, as distinguished from the "corpus" of the waters of Ahtanum Creek. As the Supreme Court of Washington recognizes: "the right to the flow of water to be used upon land * * * is treated as an *incorporeal hereditament* as distinguished from water alone which is *corporeal*."¹⁴⁹ [Emphasis supplied.] There Washington's Supreme Court stated "That water *rights* for use upon the lands are considered appurtenant to the land and, therefore, realty, is declared by our statutes and prior decisions of this court." Having thus declared the basic and underlying principle of Western water law, the court then stated: "* * * we conclude that we are not here dealing with water as personal property * * * but rather with an alleged water right as real property and the [quiet title] action was maintainable by the parties." Earlier the same court had stated that actions to quiet title to rights to the use of water are a proper remedy.¹⁵⁰

Failure to recognize that the United States of America seeks in the cause to have quieted its title to an incorporeal hereditament is evidenced by the declaration of the trial court that there must be proof of "possession of the flow." Manifestly, "pos-

¹⁴⁹ *Madison v. McNeal*, 171 Wash. 669, 675, 19 P. 2d 97, 99 (1933).

¹⁵⁰ *Spring Hill Irr. Co. v. Lake Irr. Co.*, 42 Wash. 379, 85 Pac. 6, 7 (1906).

session" is not possible in regard to rights to the use of water under the circumstances.

Title to interests of the character here involved may be quieted without pursuing the fiction of first bringing a legal action of ejectment. That conclusion is predicated upon an express statutory declaration which is in part as follows: "Any person having a valid subsisting interest in real property, and a right to the possession thereof may recover the same by an action * * * against the person claiming the title or some interest therein, and may have judgment in such action quieting or removing a cloud from plaintiff's title * * *."¹⁵¹ Washington's highest court, relying on that statute, has held that it cannot be questioned "that the plaintiff may quiet title and *recover possession* in the same action."¹⁵² [Emphasis supplied.] Under an earlier statute of the same purport Washington's Supreme Court stated. "the statute provides * * * that any person, having a valid, subsisting interest in real property and a right to the possession thereof, may recover the same by action, and may have judgment in such action quieting plaintiff's title. Under this section a person holding the legal title to the real estate with the right of possession may maintain an action to quiet his title."¹⁵³

¹⁵¹ Remington's Revised Statutes of Washington, Vol. 3, Sec. 785; Revised Codes of Washington, Sec. 7.28.010.

¹⁵² *O'Neal Land Co. v. Judge, et al.*, 196 Wash. 224, 82 P. 2d 535, 536 (1938); *Santmeyer v. Clemmance*, 147 Wash. 354, 266 Pac. 148 (1928).

¹⁵³ *White v. McSorley*, 47 Wash. 18, 20, 91 Pac. 243 244 (1907).

Consideration of the cases involving the doctrine of implied reservation as enunciated in the *Winters* case emphasizes the basic error of both law and fact which pervades the disposition made by the trial court of this case. Apparently, with all respect to the trial court, the conclusion appears to be unavoidable that it would require "possession" of the waters as a condition precedent to bringing this action irrespective of the threat of bloodshed; the law does not countenance such a requirement.

The Trial Court erred throughout its Conclusions of Law and Decision

*A. Repeatedly the Trial Court States That the United States Failed to Prove That it Was a Trustee of Rights to the Use of Water for the Reservation as a Whole or Appurtenant to any Parcel:*¹⁵⁴ The erroneous concept of the trial court that "possession" of all of the water necessary to irrigate the lands in the Ahtanum Indian Irrigation Project is a condition precedent to the successful prosecution of this cause on behalf of the Yakima Indian Tribe permeates all of the conclusions of law entered by the court. That error of the trial court is fully reviewed in the paragraphs which immediately precede. Certain it is that the law does not require "possession" of the claimed incorporeal hereditaments—the rights to the use of water here involved. There is no authority which would require "possession" as a condition precedent to quieting the title of such an interest in real property. It is thus evident from the record that each

¹⁵⁴ R. 164, Conclusions of Law Nos. 1, 2, 3 and 4.

and every element essential to prove the rights to the use of water claimed on behalf of the Yakima Indians has not only been agreed upon among the parties,¹⁵⁵ but those facts have likewise been proved beyond question.¹⁵⁶ Ignored by the trial court is the fact that under the doctrine of implied reservation as enunciated in the *Winters* case and reiterated by this Court on numerous occasions, the Indians did not have possession—could not have possession—of the rights which they were asserting. Under the circumstances it is respectfully submitted, therefore, that the United States of America, having proved without objection every requisite fact is entitled to have judgment entered for it on behalf of the Yakima Tribe of Indians pursuant to the doctrine of the *Winters* case.¹⁵⁷

*B. The Trial Court Erred in Declaring Contrary to the Fact That the United States Did Not Prove That the Defendants Have Interfered With Any Rights to the Use of Water Owned by the Yakima Tribe of Indians:*¹⁵⁸ A half century of struggle, as revealed by Appendix C of this brief and the exhibits alluded to in that Appendix, perforce deny the conclusion thus expressed by the trial court. There is, moreover, set forth above the testimony of Paul F. Henderson, witness for the United States of America, disclosing the irreparable damage experienced by the Yakima Tribe of Indians by reason of the diversions

¹⁵⁵ Pre-trial Order, R. 123; Appendices A and B of this brief.

¹⁵⁶ See in that connection pages 21 and 22, *supra*.

¹⁵⁷ See R. 123, Pre-trial Order, Agreed Facts; Appendices A and B of this brief, Exhibits of the United States of America.

¹⁵⁸ R. 165, Conclusion of Law No. 5.

of water by the defendants.¹⁵⁹ The recourse to armed guards by the Indians to prevent the diversion of water by the defendants¹⁶⁰ refutes the conclusion that there has been no interference by them. In summary, it may be stated that there is not a scintilla of evidence to support the clearly erroneous statement here under consideration.

C. *The Trial Court Erred in Declaring that "No defendant was required to plead or prove title to land outside the Yakima Indian Reservation or the water right appurtenant thereto or the amount of water used thereon:"*¹⁶¹ The court below, prior to the trial, in denying the motions to dismiss this cause, declared that the proceedings in question are "more in the nature of an action to quiet title. A water right, whether riparian or by appropriation, is real property, and upon this basis the United States might institute such a proceeding. The validity of the right of the United States to the water does not depend, according to the allegations of the complaint, upon the Code agreement but upon the supposed reservation created by the Treaty of 1855."¹⁶² There can be no doubt of the propriety of that ruling. As the court below pointed out, rights to the use of water are real property. "It is as fundamental under the law of

¹⁵⁹ *Supra*, page 8, et seq.

¹⁶⁰ R. 470, testimony of George Sargent; See also United States of America, plaintiff's exhibits 11-1 to 11-146; Appendix C of this brief.

¹⁶¹ R. 165, Conclusion of Law No. 6.

¹⁶² R. 42.

riparian rights as under the law of appropriation.”¹⁶³ Equally in accord with the above quoted ruling of the court below: “An action to quiet title as for real property is proper. And an action to settle rights is one to quiet title to realty.”¹⁶⁴

Error, however, is patent in the trial court’s conclusion here under consideration that the defendants are not required to plead and prove title to their lands. The rule is well established that: “an allegation that the defendant claims an adverse estate or interest is sufficient, without further defining it, to put him to a disclaimer, or to allegation and proof of the estate or interest which he claims, the nature of which must be known to him, and may not be known to the plaintiff.”¹⁶⁵ In declaring the sufficiency of a complaint of the nature here involved, it has been stated: “* * * the proceeding is for the purpose of stopping the mouth of a person who has asserted or is asserting a claim to the plaintiff’s property, whether such claim be founded upon evidence or utterly baseless. It is not aimed at a particular piece of evidence, but at the pretensions of an individual.” Continuing, the court stated: “* * * the action may be maintained by the owner of property to determine any adverse claim whatever. For if the defendant by his answer disclaims all interest whatever, judgment may,

¹⁶³ Wiel, *Water Rights in the Western States*, 3d ed., vol. 1, Sec. 18, pp. 20–21.

¹⁶⁴ Wiel, *Water Rights in the Western States*, 3d ed., vol. 1, sec. 283, pp. 298–300; Sec. 285, p. 301.

¹⁶⁵ *Ely v. New Mexico & Arizona RR. Co.*, 129 U. S. 291, 293 (1889).

nevertheless, be entered against him, though in such case it must be without cost. * * *

“The plaintiff, therefore, is not required to set forth the nature of the defendant’s claims. * * * The pleading is very simple. And it is well settled that the allegations above mentioned are sufficient.”¹⁶⁶

Again, it has been declared: “An action to quiet title may be maintained by the owner to determine any adverse claim of the defendant, and the plaintiff in such action is not required to set forth the nature of the defendant’s claim.”¹⁶⁷ In a very recent case California’s Supreme Court reiterated the principle in these terms: “One who alleges that he is the owner of certain described real property, that defendants claim an interest therein adversely to him, that such claim is without right, and that the defendants have no estate, title or interest whatever in said premises or any part thereof pleads all that the law requires in an action to quiet title and, in such an action, the complaint need not particularly state the facts in regard to the asserted invalidity nor attack the instrument which is claimed to be a cloud against the title of the plaintiff.”¹⁶⁸

The State of Washington’s highest court has adopted the same principles on the subject as those enunciated by the Supreme Court of the United States. It has done so specifically.¹⁶⁹ More recently

¹⁶⁶ *Castro v. Barry*, 79 Cal. 443, 446, 447, 21 Pac. 946 (1889).

¹⁶⁷ *Thompson, et al. v. Moore, et al.*, 8 Cal. 2d 367, 65 P. 2d 800, 803.

¹⁶⁸ *Ephraim v. Metropolitan Trust Co.*, 28 Cal. 2d 824, 172 P. 2d 501 (1946).

¹⁶⁹ *Watson v. Glover*, 21 Wash. 677, 59 Pac. 516 (1899).

that doctrine was recognized by the Supreme Court of the State of Washington in a case in which claims to the use of water were directly involved.¹⁷⁰ In the leading case in Washington respecting the matter there is quoted with favor this statement from a decision of the Supreme Court of the State of Oregon. There it is stated that a plaintiff “* * * may not know the nature of the ground upon which such adverse claim or interest is asserted—only that such claim to an estate or interest adverse to him is made. * * * He can then commence his suit, and require the nature and character of such adverse estate or interest to be set forth and judicially determined.”¹⁷¹

This authoritative declaration summarizes the error of the trial court in regard to that which must be pleaded in an action to quiet title to rights to the use of water. The plaintiff “need not allege that defendant has no right, as any right in defendant is a matter for the defense to plead. * * * plaintiff need allege only the ultimate facts showing his right and acts of defendant which, if unexplained, would be an invasion thereof.”¹⁷²

It is manifest, therefore, that the court below has not only misconceived the basic proposition that the United States of America was not required to prove “possession” of the rights to the use of water asserted for the Yakima Indians, it erred equally in stating that the defendants were not called upon in

¹⁷⁰ *O'Neal Land Co. v. Judge*, 196 Wash. 224; 82 P. 2d 535, 536 (1938).

¹⁷¹ *Watson v. Glover*, 21 Wash. 677, 59 Pac. 516, 517 (1889).

¹⁷² 1 *Wiel*, *Water Rights in the Western States*, 3d ed., pages 693, 694.

this cause to set up by answer their claimed rights to the use of water. Noteworthy, however, is the fact that although the defendants did not properly plead their rights, they nevertheless sought to prove them by introducing evidence which they asserted substantiated their claims, entitling them to relief by the trial court.¹⁷³

D. *The Trial Court Consistently Erred Throughout in Its Conclusion That "the State of Washington which then had jurisdiction over the waters of Ahtanum Creek, adjudicated all claims to 75% of the flow of Ahtanum Creek, which proceeding binds the United States and bars any claim to that portion of the flow:"*¹⁷⁴ The trial court erroneously declares that the rights and interests of the Yakima Indians could be adjudicated in a State court which clearly has no jurisdiction over the rights and interests of the Indians.¹⁷⁵ That is patently in error for the United States of America did not appear in the proceeding. Thus it must be concluded in regard to this error of the trial court that [1] the United States made no appearance in the proceeding; [2] no official of the United States was empowered to appear in that proceeding.¹⁷⁶ In view of the fact that the

¹⁷³ Defendants' Exhibit 139.

¹⁷⁴ R. 165, Conclusion of Law No. 7. That erroneous conclusion is expressed throughout the trial courts decision, *United States v. Ahtanum Irrigation District, et al.*, 124 F. Supp. 818 (U. S. D. C. E. D. Wash. S. D. 1954).

¹⁷⁵ See *supra*, page 42.

¹⁷⁶ *Arizona v. California*, 298 U. S. 558 (1936); *Stanley v. Schwalby*, 162 U. S. 255 (1895); *Minnesota v. United States*, 305 U. S. 382 (1938); *United States v. McIntire*, 101 F. 2d 650 (C. A. 9, 1939).

rights to the use of water of the Yakima Indians which the United States seeks here to protect were not before the State court, it is respectfully submitted these rights were not subject to it. That conclusion is based upon this declaration by the Supreme Court of the State of Washington: "In the argument submitted in support of the action of the trial court it seems to be assumed that these decrees fix the rights of the parties to the waters of Moses Lake and Crab Creek, not only as between themselves, but as to other and third parties claiming interests adverse to such parties. But a moment's reflection must convince anyone that this view is erroneous. *Although general in form, and broad enough in language to include the whole world, they can have no such effect.* They are binding on the parties to the action and their privies, but upon no one else. As to strangers claiming rights in the waters of the lake the decrees in no manner affect them. The decrees are not even evidence of adverse rights. Strangers may proceed as if the decrees had never been entered." ¹⁷⁷ [Emphasis supplied.] Recently the decision last cited and the principle enunciated there were relied upon by the Supreme Court of the State of Washington which restated that fundamental precept in these terms: "A judgment binds only those who are parties to the action in which it is rendered or those who are in privity with such parties, and it does not affect those who are strangers to it." ¹⁷⁸

¹⁷⁷ *State ex rel. McConihe v. Steiner*, 58 Wash. 578, 109 Pac. 57, 60 (1910).

¹⁷⁸ *LaFray v. Seattle*, 12 Wash. 2d 583, 588, 123 P. 2d 345, 347 (1942).

It is thus too clear for question that one of the most basic and far-reaching errors of the trial court was its declaration that the State court proceeding to which the United States was not a party is binding upon it and bars any claim on behalf of the Indians. That conclusion has effectively deprived the Yakima Indians of their day in court, which it is respectfully submitted, is of itself reversible error.

It was plain and serious error for the Trial Court to declare that the rights to the use of water of the Yakima Indians reserved by them in the Treaty of 1855 are subject to control of the State of Washington

Another basic error in the decision¹⁷⁹ is the repeated declaration that the laws of the State of Washington control the rights of the Yakima Indians in Ahtanum Creek. As revealed above, the *Winters* decision considered the precise proposition and the court concluded that: "The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. *The United States v. The Rio Grande Ditch & Irrigation Co.*, 174 U. S. 690, 702; *United States v. Winans*, 198 U. S. 371. That the Government did reserve them we have decided, and for a use which would be necessarily continued through years."¹⁸⁰

Even more pointedly this Court denied the proposition advanced by the trial court that the laws of the State of Washington would be controlling in regard to the rights of the Yakima Indians. On the subject

¹⁷⁹ *United States v. Ahtanum Irrigation District, et al.*, 124 F. Supp. 818, 824 (D. C. E. D. Wash. S. D. 1954).

¹⁸⁰ *Winters v. United States*, 207 U. S. 564, 577 (1908).

it stated: "The United States became a trustee [for the Indians], holding the legal title to the land and waters for the benefit of the Indians" and "* * * no title to the waters could be acquired by anyone except as specified by Congress."¹⁸¹ That conclusion simply reiterates the proposition emphasized above that the Indians thus reserved by their Treaty sufficient water from Ahtanum Creek to make habitable their arid lands.

Subsequent to the Decision of the Trial Court in This Case the Supreme Court of the United States of America Rendered a Decision Diametrically Opposed to the Conclusions Stated by the Trial Court and Thus Reversed Them¹⁸²

Recently the highest Court considered the precise question of whether the Act of 1866, and the Act of 1870¹⁸³ and the Desert Land Act of 1877¹⁸⁴ had application to the Warm Springs Indian Reservation and the streams bordering on that Reservation. Like the Yakima Reservation the one last mentioned was established pursuant to a Treaty of 1855. With infinite clarity our highest Court stated that the Acts last cited related only to "public lands."¹⁸⁵ Then the Court added: "The lands before us [the Warm Springs Indian Reservation] in this case are not 'public lands' but 'reservations'." Our Supreme

¹⁸¹ *United States v. McIntire*, 101 F. 2d 650, 653-654 (C. A. 9, 1939).

¹⁸² *Federal Power Commission v. State of Oregon*, 349 U. S. 435 (1954).

¹⁸³ 43 U. S. C. 661.

¹⁸⁴ 43 U. S. C. 321.

¹⁸⁵ *Federal Power Commission v. State of Oregon*, 349 U. S. 435, 448 (1954).

Court thus refutes the whole predicate of the decision of the trial court wherein it states that in some manner the United States of America had relinquished the rights to the use of water reserved by the Yakima Tribe of Indians to make habitable their lands, all as contemplated by their Treaty of 1855.

It is respectfully submitted that the decision in *Federal Power Commission v. State of Oregon* discloses the error of the rationale of the trial court necessitating that the latter be reversed. The conclusion expressed that the laws of the State of Washington do not control the rights to the use of water of the Yakima Tribe of Indians is fully supported by the Enabling Act pursuant to which that State became a member of the Union and by the Constitution of the State of Washington.¹⁸⁶

Unconscionable Waste of the Waters of Ahtanum Creek Results From Trial Court's Judgment of Dismissal

While the Yakima Indians receive insufficient water from Ahtanum Creek to raise their crops, the defendants flagrantly waste the waters of that stream.

Wasted water from Ahtanum Creek, hub-deep in the highway as encountered by the trial court when it made its thorough on-the-ground inspection;¹⁸⁷

open canals with neither headgates, weirs or any method to control or measure water, as likewise seen by the trial court;¹⁸⁸

¹⁸⁶ See *supra*, page 42.

¹⁸⁷ R. 471, 472, Testimony of George Sargent.

¹⁸⁸ R. 518, Testimony of Charles J. Bartholet, State Supervisor of Water Resources: R. 505, Testimony of J. R. Rutherford.

“use of [uncontrolled] sloughs” and old river beds as ditches;

rank growth of tules, watergrass and cat-tails further evidencing waste;¹⁸⁹

no efforts to distribute water, “when the creek is up high we get the water;”¹⁹⁰

those proved facts elicited largely from witnesses of the defendants reveal the methods pursued by the water users north of Ahtanum Creek.

By the unjustified dismissal of the cause the trial court condones the unconscionable waste of water. Sensible control of the limited supply of water in question would go far to resolve the half-century of conflict now before this Honorable Court for review.

The Agreed Facts and the Proof by the United States of America of the Claims of the Yakima Indians in Ahtanum Creek Preclude a Judgment of Dismissal

This question is respectfully presented: Upon what basis in law could this case be dismissed?

The United States of America without objection and based upon a stipulation admitting all exhibits, proved the claims of the Yakima Tribe of Indians to the rights to the use of water in Ahtanum Creek concerning which the decree quieting title was prayed.¹⁹¹ Repeated references to Appendices A and B have been made. Those Appendices are exhibits in the trial of this case, introduced by the United

¹⁸⁹ R. 471, 472, Testimony of George Sargent.

¹⁹⁰ R. 511, Testimony of E. J. Shockley.

¹⁹¹ R. 123, Pre-trial Order, Agreed Facts; R. 99, Stipulation admitting exhibits of the United States of America into evidence without objection.

States of America into the record without objection. An examination of those documents by this Honorable Court will reveal that they in themselves, title to the lands being vested in the United States of America as trustee for the Yakima Tribe of Indians, reflect every aspect essential for a decree. Consequently dismissal under the circumstances is contrary to every precept of justice and equity.

Denying that the complaint is in any way insufficient, it is nevertheless observed in view of the proof adduced in the case that the matter is purely academic. For where, as here, a pre-trial order specifying the issues has been entered, a case fully proved, evidence adduced without objection and a trial on the merits concluded, the pleadings are in effect superseded as the pre-trial order entered by the trial court actually discloses.¹⁹² It is specifically recognized by Rule 15, assuming the insufficiency of the complaint, which is denied, proof having been adduced without objection, the pleadings are impliedly amended, "but failure so to amend does not affect the result of the trial of these issues."¹⁹³ This Honorable Court has recognized the basic principles of modern jurisprudence reflected in the Federal Rules of Civil Procedure in these terms: "There was * * * admitted without objection evidence that some of the * * * answers were false. Thus the issue of fraud, though not raised by the pleadings, was tried by implied consent of the parties.

¹⁹² R. 146.

¹⁹³ Federal Rules of Civil Procedure, Rule 15 (b). 3 Moore's Federal Practice, 2d ed., page 848.

Accordingly, and properly, the court treated that issue as if it had been raised by the pleadings.¹⁹⁴

It is abundantly manifest, therefore, that in the light of the proved facts there was no basis in law for the dismissal of this cause by reason of the fact that had the pleadings been inadequate, which is denied, the evidence adduced was more than sufficient to warrant judgment for the United States of America.

Election by the United States to Stand on Its Proof and Its Pleadings Is Entirely Justified and the Trial Court Erred in Entering Judgment of Dismissal Rather Than a Judgment on the Merits

This chronicle of events is essential in the consideration of the election by the United States of America to stand on its proof and pleadings.

August 3, 1951, after a full trial on the merits, all parties rested:¹⁹⁵

Two years and seven months thereafter, on March 9, 1953, there was filed a decision by the trial court;¹⁹⁶

Immediately after the filing of the decision, on April 13, 1953, the United States of America filed a "Motion to Modify and Clarify Opinion;"¹⁹⁷

On June 22, 1953, the United States Attorney requested a hearing on the motion last mentioned;¹⁹⁸

Virtually one year later, on May 4, 1954,¹⁹⁹ the trial

¹⁹⁴ *United States v. Cushman*, 136 F. 2d 815, 817 (C. A. 9, 1943); cert. denied, 320 U. S. 786 (1943).

¹⁹⁵ R. 567.

¹⁹⁶ 124 F. Supp. 818—Note: Opinion dated March 7, 1953, actually filed with Clerk of the Court March 9, 1953.

¹⁹⁷ R. 157.

¹⁹⁸ R. 168.

¹⁹⁹ R. 169; 124 F. Supp. 818.

court filed an amendment to its opinion of March 9, 1953;

On October 20, 1954,²⁰⁰ the United States Attorney was directed to contact the trial court in regard to the ultimate disposition of the matter;

On November 9, 1954, the court entered findings of fact, conclusions of law and judgment dismissing the cause on its merits;²⁰¹ Motion of the United States of America²⁰² objected to as not being timely;

January 5, 1955, a timely notice of appeal was filed.²⁰³

Even subsequent to the notice of appeal the United States of America was in frequent correspondence with the trial court in an effort to rectify what it considered to be a most grievous error.²⁰⁴ A review of the letters to the trial court stemming from its request in connection with the record in the cause is highly significant.²⁰⁵ A final order respecting this matter was filed by the trial court on September 6, 1955.²⁰⁶

A "Petition for an Injunction Pending Appeal" was filed by defendants November 7, 1955, in the court below. That court ordered the United States of

²⁰⁰ R. 169.

²⁰¹ R. 159.

²⁰² R. 167.

²⁰³ R. 199.

²⁰⁴ In that connection a hearing was held on February 2, 1955, in which the United States of America reiterated and reaffirmed its position that the case had been fully tried and a decree on the merits—not dismissal—was the only appropriate disposition which could be made under the circumstances.

²⁰⁵ See in that connection letter of March 4, 1955; letter of March 8, 1955, and related documents, R. 188 et seq.

²⁰⁶ R. 209.

America to answer the petition by December 19, 1955. A motion to dismiss and answer has been filed and a hearing set for January 4, 1956.

A half century of costly, contentious, protracted and bitter conflict over the rights to the use of water of Ahtanum Creek should be concluded by a judgment on the merits—a judgment of dismissal is a manifest injustice under the circumstances. It has been authoritatively declared: “It is * * * the duty of federal courts * * * to provide speedy justice, and *dismissals should be avoided*, if possible, where the court had jurisdiction, a full hearing has been had, and the parties appear to be entitled to some kind of relief which the court can award.”²⁰⁷

As Justice Holmes declared “there is a wrong to be righted”²⁰⁸ and a dismissal does not resolve the issues.

CONCLUSION

This Honorable Court, in view of the full trial on the merits in the court below, is requested to reverse the judgment of dismissal, remanding the matter to the trial court so that judgment may be entered in favor of the Yakima Indians quieting their title to the rights to the use of water in Ahtanum Creek and declaring invalid the alleged agreement of May 9, 1908.

UNITED STATES OF AMERICA,
J. LEE RANKIN,
Assistant Attorney General.

WILLIAM H. VEEDER,
Attorney, Department of Justice.

²⁰⁷ 9 Cyc. Fed. Proc., 3d ed. Sec. 29.14, page 102.

²⁰⁸ *Wisconsin v. Illinois*, 281 U. S. 197 (1929).

APPENDIX A

USA—Pl. Ex. 4-c, Pre-trial Order Ex. A

TABULATION SHOWING WATER DIVERSIONS AND IRRIGATED AREAS ALONG AHTANUM CREEK WITHIN BOUNDARY OF YAKIMA INDIAN RESERVATION, WASHINGTON

Allotment No.	Ditch	Dates		Location diversion point of ditch				Total irrigated acreage (maximum)				Irrigable acreage (maximum)				Comments	
		From—	To—	¼ sec.	Sec.	TWP. N.	RA. E.W.M.	No. acres	¼ sec.	Sec.	TWP. N.	RA. E.W.M.	No. acres	¼ sec.	Sec.		TWP. N.	RA. E.W.M.
820---	M. C. ---	1909	Date	Lot 5---	14	12	16	67.0	SWSE--- SESW--- NENW--- NWNE---					SWSE--- SESW--- NENW--- NWNE---	14 12 17	17	Original allottee, Felix Emeunot, 1893.
821---	Indiv. --- Felix. --- N. C. ---	1885 1895 1909	1894 1908 Date	NE¼--- Lot 8--- Lot 5---	15 15 14	12 12 16	17	71.7	NESW--- Lot 7--- W½L5--- L. 6 and 7					NESW--- Lot 7--- W½L5--- L. 6 and 7	14 12 17	17	Original allottee, "Shaler," 1885.
903---	Indiv. --- Yallup. --- Govt. --- M. C. ---	1853 1870 1896 1909	1869 1895 1908 Date	NE¼--- Lot 6--- Lot 7--- Lot 5---	16 16 13	12 12 16	17	58.5									Original allottee, Yallup, 1893.
904---	Indiv. --- Felix. --- M. C. ---	1885 1896 1909	1895 1908 Date	Lot 8--- Lot 8--- Lot 5---	15 13 14	12 12 16	17	57.0	NESW--- Lot 8--- E½L. 5--- Lot 8---	16 12 17	17	94.5		NESW--- Lot 8--- E½L. 5--- Lot 8---	16 12 17	17	Original allottee, "Johnnie," 1885.
906---	Govt. --- M. C. ---	1896 1909	1908 Date	Lot 7--- Lot 5---	13 14	12 16	16	55.1	SWSW--- E½SW---	16 12 17	17	61.4		SWSW--- E½SW---	16 12 17	17	Original allottee, Cus-Sun-My 1893.
907---	Govt. --- M. C. ---	1896 1909	1908 Date	Lot 7--- Lot 5---	13 14	12 16	16	75.5	SWSW--- E½SW---	16 12 17	17	74.6		E½SW--- SESE---	16 12 17	17	Original allottee, Agnes Cus-Sun-My, 1893.
908---	M. C. --- M. C. ---	1909 1909	Date Date	Lot 5--- Lot 5---	14 14	12 16	16	80	SESE--- SWSW---	16 12 17	17	80.0		E½SW--- SESE---	16 12 17	17	Original allottee, Cadia Shike 1893. Patent in Fee No., dated July 13, 1908.

909	Govt. M. C.	1896 1909	1908 Date	Lot 7... Lot 5...	13 14	12 12	16 16	76.8	W $\frac{1}{2}$ SE	16	12	17	76.6	W $\frac{1}{2}$ SE	16	12	17	Thewall Slusecum, 1893. Original allottee Patent in Fee No. 778117 dated Oct. 10, 1920.
912	Felix M. C.	1885 1909	1908 Date	Lot 8... Lot 5...	15 14	12 12	17 16	61.5	S $\frac{1}{2}$ L. 5. NESE					S $\frac{1}{2}$ L. 5. NESE				Original allottee Shilow, prior to 1885.
913	M. C.	1909	Date	Lot 5...	14	12	16	80.0	SESW	15	12	17	77.7	W $\frac{1}{2}$ SESE	15	12	17	Original allottee, Ah-Hy Shi-Low,
916	Indiv. Felix	1870 1896	1895 1908	NE $\frac{1}{4}$... Lot 8...	15 15	12 12	17 17	82.3	N $\frac{1}{2}$ L. 5. N $\frac{1}{2}$ NWSW	15	12	17	78.5	SWSE	15	12	17	Original allottee, "Sonatup" prior to 1893.
917	Felix M. C.	1896 1909	1908 Date	Lot 8... Lot 5...	15 14	12 12	17 16		Lot 8. SWSW	14	12	17	82.3	Lot 8. SWSW	14	12	17	Original allottee, Sa-Pe-Ah Sloutier, 1893.
918	M. C.	1909	Date	Lot 5...	14	12	16		S $\frac{1}{2}$ NWSW	14	12	17	79.2	E $\frac{1}{2}$ SESE	15	12	17	Original allottee, Swa-Has Sloutier, 1893.
920	Yemowat. do	1885 1904	1903 1908	NE $\frac{1}{4}$... NW $\frac{1}{4}$...	14 13	12 12	17 17	40.9	E $\frac{1}{2}$ NE	22	12	17	23.0	W $\frac{1}{2}$ NW	23	12	17	Original allottee, Catherine Smartlowat, 1893.
921	M. C.	1909	Date	Lot 5...	14	12	16	90.4	SE	13	12	17	89.0	SE $\frac{1}{4}$	13	12	17	Original allottee, Susan Smartlowat, 1893.
922	Felix M. C.	1904 1909	1908 Date	Lot 8... Lot 5...	15 14	12 12	17 16	80.0	S $\frac{1}{2}$ NE	13	12	17	80.0	S $\frac{1}{2}$ NE	13	12	17	Original allottee, Agatha Smartlowat, 1893.
923	Yemowat. do	1885 1904	1903 1908	NE $\frac{1}{4}$... NW $\frac{1}{4}$...	14 13	12 12	17 17	39.2	NENE	13	12	17						Original allottee, T. Smartlowat, 1893.
924	M. C. Yemowat. do	1909 1885 1904	1908 1903 1908	Lot 5... NE $\frac{1}{4}$... NE $\frac{1}{4}$...	14 14 13	12 12 17	16 17 16		L. 5 & 6. NENE	12 13	12 17	17 17	40.0	NENE	13	12	17	Original allottee, Elizabeth Smartlowat, 1893.
925	M. O. Yemowat. M. O.	1909 1904 1909	Date 1908 Date	Lot 5... NW $\frac{1}{4}$... Lot 5...	14 13 14	12 12 12	16 16 16		NENE	17	12	18	85.9	NWNE	13	12	17	Original allottee, Mary Yemowat, 1893.
				Lot 5...	14	12	16	80.0	NENE	18	12	18	79.5	NENE	18	12	18	

938	Lower M. C.	1893 1914	1913 Date	Lot 8 Lot 5	7 14	12 12	18 16	72.3	W $\frac{1}{2}$ L. 9 NWNE	4	12	18	W $\frac{1}{2}$ L. 9 NWNE	4	12	18	Original allottee, James Jemowat, 1893.
939	Lower M. C.	1893 1914	1913 Date	Lot 8 Lot 5	7 14	12 12	18 16	69.5	W $\frac{1}{2}$ NENE L. 5, 10, and 11.	9	12	18	W $\frac{1}{2}$ NENE L. 5, 10, and 11.	9	12	18	Original allottee, Josephine Yemowat, 1893.
940	Lower Yemowat. M. C.	1893 1904 1909	1903 1908 Date	Lot 8 NW $\frac{1}{4}$ Lot 5	7 13 14	12 12 12	18 17 16	83.4	E $\frac{1}{2}$ L. 8 E $\frac{1}{2}$ SESE W $\frac{1}{2}$ L. 9 S $\frac{1}{2}$ E $\frac{1}{2}$ L. 9 S $\frac{1}{2}$ NESW S $\frac{1}{2}$ SW	9 7 8 8	12 12 12	18 18 18	E $\frac{1}{2}$ L. 8 E $\frac{1}{2}$ SESE W $\frac{1}{2}$ L. 9 S $\frac{1}{2}$ E $\frac{1}{2}$ L. 9 S $\frac{1}{2}$ NESW	9 7 8	12 12	18 18	Original allottee, Mary Augustus Yemowat 1893.
942	Yemowat. do. M. C.	1885 1904 1909	1903 1908 Date	NE $\frac{1}{4}$ NW $\frac{1}{4}$ Lot 5	14 13 14	12 12 12	17 17 16	80	S $\frac{1}{2}$ NESW S $\frac{1}{2}$ SW Lot 7	8 8	12 12	18 18	S $\frac{1}{2}$ SW Lot 7	8	12	18	Original allottee, Wm. Yemowat.
943	Lower M. C.	1893 1909	1908 Date	Lot 8 Lot 5	7 14	12 12	18 16	47.9	NE $\frac{1}{4}$ L. 9 N $\frac{1}{2}$ NESW Lots 5, 6, and 8	8	12	18	NE $\frac{1}{4}$ L. 9 N $\frac{1}{2}$ NESW Lots 5, 6, and 8	8	12	18	Original allottee Snatups Kukula Yemowat, 1893.
944	Lower M. C.	1893 1909	1908 Date	Lot 8 Lot 5	7 14	12 12	18 16	75	Lots 5, 6, and 8	8	12	18	Lots 5, 6, and 8	8	12	18	Original allottee, Sappeouke, Patent in Fee No. 744782, issued April 15, 1920.
945	Lower	1895	Date	Lot 8	7	12	18	58.3	L. 11 and 12 Lot 9 NENW N $\frac{1}{2}$ NWNWNE E $\frac{1}{2}$ NWNWNE N $\frac{1}{2}$ NWNWNE L. 9 and 10	2 3 11 11 2	12 12 12	18 18 18	L. 11 and 12 Lot 9 NENW N $\frac{1}{2}$ NWNWNE E $\frac{1}{2}$ NWNWNE N $\frac{1}{2}$ NWNWNE L. 9, and 10	2 3 11 11 2	12 12 12	18 18 18	Original allottee, Wm. Teelas, 1893.
946	do.	1895	Date	Lot 8	7	12	18	63.6	E $\frac{1}{2}$ NWNWNE N $\frac{1}{2}$ NWNWNE L. 9 and 10	11 11 2	12 12 12	18 18 18	E $\frac{1}{2}$ NWNWNE N $\frac{1}{2}$ NWNWNE L. 9, and 10	11 11 2	12 12 12	18 18 18	Original allottee, Ehen Teelas, 1893.

TABULATION SHOWING WATER DIVERSIONS AND IRRIGATED AREAS ALONG AHTANUM CREEK WITHIN BOUNDARY OF YAKIMA INDIAN RESERVATION,
WASHINGTON—Continued

Allotment No.	Ditch	Dates		Location diversion point of ditch				Total irrigated acreage (maximum)				Irrigated acreage (maximum)				Comments		
		From	To	1/4 sec.	Sec.	TWP. N	RA. E.W.M.	No. acres	1/4 sec.	Sec.	TWP. N	RA. E.W.M.	No. acres	1/4 sec.	Sec.		TWP. N	RA. E.W.M.
947	Lower	1895	1913	Lot 8	7	12	18	80	NENE	10	12	18		NENE				Original allottee, Jas. Teelas, Patent in Fee No. 706936 issued Sept. 19, 1919.
	M. C.	1914	Date	Lot 5	14	12	16		NWNW	11	12	18	80	NWNW	11	12	18	
951	Govt.	1896	1908	Lot 7	13	12	16	34	Lot 6					Lot 6				Original allottee, Patent in Fee No. 107386 issued August 30, 1912.
	M. C.	1909	Date	Lot 5	14	12	16		SESE	18	12	17	40	SESE	18	12	17	
956	Indiv.	1885	1908	Lot 5	14	12	16	8.4	Lot 5	13	12	16	8.4	Lot 5	13	12	16	Original allottee, Penape Sapallel, 1893.
	do.	1885	1908	Lot 5	13	12	16	8	L. 6, 7, 8.					L. 6, 7, 8.				
960	M. C.	1909	Date	Lot 5	14	12	16		NESW	13	12	16	30	NESW	13	12	16	Original allottee, Cecelia Odet, 1893.
	Lower	1895	1911	Lot 8	7	12	18	77.8	NWNW	10	12	18		NWNW	10	12	18	
1506	M. C.	1912	Date	Lot 5	14	12	16		E 1/2 NENE	9	12	18	77.8	E 1/2 NENE	9	12	18	Original allottee, Dick Wynaco, 1894, Patent in Fee No. 185219 issued Mar. 23, 1911.
	Lower	1895	1913	Lot 8	7	12	18	56.2	E 1/2 L. 9	4	12	18	77.8	E 1/2 L. 9	4	12	18	
1509	M. C.	1914	Date	Lot 5	14	12	16		NENW	10	12	18		NENW	10	12	18	Original allottee, Kamosma Wynaco, 1893.
	Indiv.	1885	1892	NW 1/4	14	12	17	76.6	N 1/2 SENW	10	12	18		N 1/2 SENW	10	12	18	
1677	Indiv.	1885	1908	Lot 8	15	12	17		L. 11 and 12	3	12	18	77.7	L. 11 and 12	3	12	18	Original allottee, James Untuch, 1894.
	Felix	1909	Date	Lot 5	14	12	16		NWSE	14	12	17	80.9	NWSE	14	12	17	
1678	M. C.	1893	1909	Lot 8	15	12	17	76.7	Lot 5					Lot 5				Original allottee, Adeline Untuch, 1894.
	Indiv.	1885	1892	NW 1/4	14	12	17		SENE					SENE				
1701	M. C.	1909	Date	Lot 5	14	12	16		N 1/2 NENE	14	12	17	81	N 1/2 NENE	14	12	17	Original allottee, Wah-Lal-Lal-Kite, 1894.
	Indiv.	1870	1908	SW 1/4	17	12	17	49	Lot 7	17	12	17	69.2	Lot 7	17	12	17	
	M. C.	1909	Date	Lot 5	14	12	16		Lot 8	17	12	17		Lot 8	17	12	17	

TABULATION SHOWING WATER DIVERSIONS AND IRRIGATED AREAS ALONG AHTANUM CREEK WITHIN BOUNDARY OF YAKIMA INDIAN RESERVATION,
WASHINGTON—Continued

Allot- ment No.	Ditch	Dates		Location diversion point of ditch				Total irrigated acreage (maximum)				Irrigable acreage (maximum)				Comments			
		From—	To—	¼ sec.	Sec.	TWP. N	RA. EWM.	No. acres	¼ sec.	Sec.	TWP. N	RA. EWM.	No. acres	¼ sec.	Sec.		TWP. N	RA. EWM.	
2779..	Lower.... M. C.....	1905	1913	Lot 8.... Lot 5....	7 14	12 12	18 16	71.3	W½SWNE... SENW.....					W½SWNE... SENW.....					Original allottee, Phillis Yantomeonwit, Patent in Fee issued December 22, 1910.
2785..	M. C.....	1915	Date	Lot 5....	14	12	16	67.5	E½SWNW... E½ L. 2.... L. 6, 7, 8..	11 12 7	12 12 19	18 18 96.7	80	E½SWNW... E½ L. 2.... L. 6, 7, 8..	11 12 7	12 12 19	18 18 19		Original allottee, John Pims, 1905.
2787..	M. C.....	1915	Date	Lot 5....	14	12	16	64.5	S½NENW... W½ L. 2.... Lot 9.....					S½NENW... W½ L. 2.... Lot 9.....					Original Allottee, Ike Isaacs, Patent in Fee, No. 615515 dated Jan. 30, 1918, issued for S½NE-NW; Patent in Fee No. 633030; June 4, 1918 for Lot 9.
2788..	Lower.... M. C.....	1905	1914	Lot 8.... Lot 5....	7 14	12 12	18 16	40 40	SWNW..... SWNW.....	12 12	12 12	18 18		W½ L. 2.... Lot 9.....	12 1	12 12	12 18		Original Allottee, John Skahan 1905, Patent in Fee No. 768397 issued Aug. 19, 1920.
2789..	M. C.....	1915	Date	Lot 5....	14	12	16	80	SWNE..... SENW.....					SWNE..... SENW.....					Original Allottee, Antoine Skahan, 1905.
2794..	M. C.....	1909	Date	Lot 5....	14	12	16	24	NW.....	12 21	12 12	18 17	80 29.2	SENW..... NW.....	12 21	12 12	18 17		Original allottee, Metella Pims, 1905.
2886..	Yemowat M. C.....	1904	1908	NW¼..... Lot 5....	13 14	12 12	17 16	40	SWSE.....	8	12	18	40	SWSE.....	8	12	18		Original allottee, Hattie John, 1905.
3074..	Lower.... M. C.....	1909	Date	Lot 5....	14	12	16	66	SWNW.....					SWNW.....					Original allottee, William Sampson, 1905.
3075..	M. C.....	1909	Date	Lot 5....	14	12	16	77.5	Lot 2..... SWNE.....	9	12	18	70.8	Lot 2..... SWNE.....	9	12	18		Original Allottee, Sampatiet Sampson, 1905.
3151..	M. C.....	1914	Date	Lot 5....	14	12	16	56	SENW.....	9	12	18	73.6	SENW.....	9	12	18		Original Allottee, Andrew Foster, 1908.
		1909	Date	Lot 5....	14	12	16		SENW..... SWNE.....	17	12	18	56.5	SENW..... SWNE.....	17	12	18		

3342..	M. C.	1909	Date	Lot 5...	14	12	16	23.1	NWNE& W $\frac{1}{2}$ NENE& W $\frac{1}{2}$ W $\frac{1}{2}$ E $\frac{1}{2}$ of NENE	21	12	17	23.2	NWNE& W $\frac{1}{2}$ W $\frac{1}{2}$ E $\frac{1}{2}$ of NENE	21	12	17	Original allottee, Josephine Phillips, 1910.
3343..	M. C.	1911	Date	Lot 5...	14	12	16	38.4	E $\frac{1}{2}$ W $\frac{1}{2}$ E $\frac{1}{2}$ NE NE&E $\frac{1}{2}$ E $\frac{1}{2}$ of NENE	21	12	17	21	E $\frac{1}{2}$ W $\frac{1}{2}$ E $\frac{1}{2}$ NE NE&E $\frac{1}{2}$ E $\frac{1}{2}$ of NENE	21	12	17	Original allottee, David Slusecum, 1910.
3344..	M. C.	1911	Date	Lot 5...	14	12	16	29	NENE NWNW&W $\frac{1}{2}$ W $\frac{1}{2}$ NENW& W $\frac{1}{2}$ E $\frac{1}{2}$ W $\frac{1}{2}$ of NENE	21	12	17	21	NENE NWNW&W $\frac{1}{2}$ W $\frac{1}{2}$ NENW& W $\frac{1}{2}$ E $\frac{1}{2}$ W $\frac{1}{2}$ of NENE	21	12	17	Original allottee, Mabel Edwards, 1910.
3345..	M. C.	1910	Date	Lot 5...	14	12	16	35	SESE&S $\frac{1}{2}$ W $\frac{1}{2}$ S $\frac{1}{2}$ W $\frac{1}{2}$ NESE	14	12	17	23.3	SESE&S $\frac{1}{2}$ W $\frac{1}{2}$ S $\frac{1}{2}$ W $\frac{1}{2}$ NESE	14	12	17	Original allottee, David Slusecum, 1910.
3346..	M. C.	1910	Date	Lot 5...	14	12	16	25.7	NWNE&E $\frac{1}{2}$ W $\frac{1}{2}$ of NENE S $\frac{1}{2}$ W $\frac{1}{2}$ NESE	22	12	17	25.5	NWNE&E $\frac{1}{2}$ W $\frac{1}{2}$ of NENE S $\frac{1}{2}$ W $\frac{1}{2}$ NESE	22	12	17	Original allottee, Ava Smartlowat, 1910.
3348..	M. C.	1911	Date	Lot 5...	14	12	16	28.4	Lot 3...	18	12	18	36.7	Lot 3...	18	12	18	Effie Dick, 1910.
3349..	M. C.	1911	Date	Lot 5...	14	12	16	29.8	NESW&W $\frac{1}{2}$ W $\frac{1}{2}$ NESE	18	12	18	24.9	NESW&W $\frac{1}{2}$ W $\frac{1}{2}$ NESE	18	12	18	Original allottee, Peter Smartlowat, 1910.
3351..	M. C.			Lot 5...	14	12	16	0	W $\frac{1}{2}$ NESE	18	12	18	5	NWSE	17	12	18	Original allottee, Annie Mann, 1910.
3352..	M. C.	1911	Date	Lot 5...	14	12	16	40	SENE	18	12	18	40	E $\frac{1}{2}$ NESE	18	12	18	Original allottee, Oscar Yapwishmet, 1910.
3353..	M. C.	1911	Date	Lot 5...	14	12	16	40	SWNW	17	12	18	39	SWNW	17	12	18	Original allottee, Pauline Yapwishmet, 1910; Patent in Fee No. 732,754 issued Feb. 4, 1920.
3354..	M. C.	1911	Date	Lot 5...	14	12	16	17.5	W $\frac{1}{2}$ NW	16	12	18	13.3	W $\frac{1}{2}$ NW	16	12	18	Original allottee, Alex Yemowat, 1910.
3355..	M. C.			Lot 5...	14	12	16	0					8.7	SESW	9	12	18	Original allottee, Josephine Yemowat, 1910.
3356..	M. C.	1914	Date	Lot 5...	14	12	16	27.9	NESW	9	12	18	31.3	E $\frac{1}{2}$ SW NESW	16 9	12 12	18 18	Original allottee, Cataline Watlamat, 1910.

TABLE SHOWING WATER DIVERSIONS AND IRRIGATED AREAS ALONG AHTANUM CREEK WITHIN BOUNDARY OF YAKIMA INDIAN RESERVATION,
WASHINGTON—Continued

Allotment No.	Ditch	Dates		Location diversion point of ditch				Total irrigated acreage (maximum)				Irrigable acreage (maximum)				Comments		
		From—	To—	¼ sec.	Sec.	TWP. N	RA. E.W.M.	No. acres	¼ sec.	Sec.	TWP. N	RA. E.W.M.	No. acres	¼ sec.	Sec.		TWP. N	
3357..	M. C.	1914	Date	Lot 5...	14	12	16	37.0	SENE.....	9	12	18	33.3	SENE.....	9	12	18	Original allottee, Augustus Mann, 1910.
3358..	M. C.	1914	Date	Lot 5...	14	12	16	39.0	S½SE ¹ / ₂ NW & SWNW.	10	12	18	33.5	S½SE ¹ / ₂ NW & SWNW.	10	12	18	Original allottee, Christine Mann, 1910.
3359..	M. C.	1914	Date	Lot 5...	14	12	16	44	NWSE.....	10	12	18	46.7	NWSE.....	10	12	18	Original allottee, Helen Bradley, 1910.
3360..	M. C.	1914	Date	Lot 5...	14	12	16	51	SENE.....	10	12	18	52.6	NESE.....	10	12	18	Original allottee, Anna P. Bradley, 1910.
3361..	Lower.....	1914	Date	SE¼...	7	12	18	55	NESE & N½ NWSW	11	12	18	64.1	NESE & N½ NWSW	11	12	18	Original allottee, Mary Langell, 1910.
3362..	M. C.	1914	Date	Lot 5...	14	12	16	40	W½SWNW..	11	12	18	33.9	W½SWNW..	11	12	18	Original allottee, Mark Wilcox, 1910; Patent in Fee No. 605,984, Nov. 12, 1917.
3364..	M. C.	1915	Date	Lot 5...	14	12	16	35.7	NWSW.....	12	12	18	31.4	NWSW.....	12	12	18	Original allottee, Ruby Wilcox, 1910.
3365..	M. C.	1915	Date	Lot 5...	14	12	16	53	NWSE.....	12	12	18	53	NWSE.....	12	12	18	Original allottee, George Eaton, 1910; Patent in Fee No. 882,763 dated Oct. 11, 1922.
3366..	M. C.	1915	Date	Lot 5...	14	12	16	68.6	NESE.....	12	12	18	69.4	NESE.....	12	12	18	Original allottee, Josephine Skahan, 1910.
3469..	M. C.	1915	Date	Lot 5...	14	12	16	38	SENE..... Lots 11, 12...	7	12	19	37.7	SENE..... Lots 11, 12...	7	12	19	Original allottee, Lorena Langell, 1910; Patent in Fee No. 605,985, Nov. 2, 1917.
3627..	M. C.			Lot 5...	14	12	16	0					1.9	NESW.....	17	12	18	Original allottee, Thomas Yemowat, 1910.

ISOLATED ALLOTMENTS ABOVE NARROWS

Allotment No.	Ditch	Dates		Location diversion point of ditch				Total irrigated acreage (maximum)				Irrigable acreage (maximum)				Comments.				
		From	To	1/4 sec.	Sec.	TWP. N	R.A. E.W.M.	No. acres	1/4 sec.	Sec.	TWP. N	R.A. E.W.M.	No. acres	1/4 sec.	Sec.		TWP. N	R.A. E.W.M.		
914	No. 4	1885	Date	Lot 5	17	12	16	6	Lot 8		17	12	16	42	Lot 8		17	12	16	Original allottee, Josephine Shilow, 1893.
962	No. 5	1888	Date	Lot 7	16	12	16	11	Lots 7 and 10		15	12	16	41	Lot 7		15	12	16	Original allottee, Charles Tomaskan, 1893.
964	No. 5	1888	Date	Lot 7	16	12	16	10	Lots 5, 6, 11, 12		15	12	16	38	Lots 5, 6, 11, 12		15	12	16	Original allottee, Liza Tomaskan, 1893.
965	No. 5	1888	Date	Lot 7	16	12	16	27	Lot 8		15	12	16	27	Lot 8		15	12	16	Original allottee, Emma Tomaskan, 1893.
967	No. 3	1870	Date	Lot 10	18	12	16	8	Lot 9		18	12	16	26	Lot 9		18	12	16	Original allottee, Thomas Smartlowat, 1893.
969	No. 3	1870	Date	Lot 11	18	12	16		Lot 8		18	12	16	24	Lot 8		18	12	16	Original allottee, Seymour Smartlowat, 1893.
970	No. 1	1870	Date	Lot 10	18	12	16	16.7	Lot 8		18	12	16	24	Lot 8		18	12	16	Original allottee, Um-Ship-Um Twi-Wash, 1893; Patent in Fee No. 148,735 and No. 42,722-8, Oct. 12, 1908.
971	No. 1	1893	Date	Lot 6	24	12	15	27.6	Lots 7, 8		24	12	15	40	Lots 7, 8		24	12	15	Original allottee, Charlie Tomaskan, 1885.
973	No. 3	1870	Date	Lot 11	18	12	16	7	Lot 5		19	12	16	79	Lot 5		19	12	16	Original allottee, Pat Yowan, 1893.
			Date	Lot 10	18	12	16		Lot 5		17	12	16	7	Lot 5		17	12	16	
Total								150.7						324						

APPENDIX B

USA—Pl. Ex. 4-e, Pre-trial Order Ex. B.

STREAM FLOW NORTH FORK AHTANUM CREEK, YAKIMA INDIAN RESERVATION, WASHINGTON, FROM OFFICIAL RECORDS OF U. S. GEOLOGICAL SURVEY

Year	April		May		June		July		August		September	
	Total (acre- feet)	Sec. feet		Total (acre- feet)	Sec. feet		Total (acre- feet)	Sec. feet		Total (acre- feet)	Sec. feet	
		Max.	Min.		Max.	Min.		Max.	Min.		Max.	Min.
1947-----	6,680	192	61	13,270	295	165	6,790	204	57	2,280	54	26
1946-----	5,390	191	37	13,540	309	119	9,040	216	95	2,570	100	33
1945-----	3,840	114	29	8,930	207	88	5,570	179	42	1,470	40	17
1944-----	2,720	76	26	5,280	119	61	3,060	93	23	1,080	23	13
1943-----	10,580	279	125	10,370	312	100	11,890	248	152	5,700	181	41
1942-----	7,940	174	90	8,800	242	88	6,260	160	63	2,310	63	24
1941-----	6,660	154	84	6,540	148	83	3,540	83	35	1,260	34	15
1940-----	6,760	148	76	10,310	218	131	4,850	137	38	1,580	36	20
1939-----	4,900	113	63	6,790	152	87	3,590	89	38	1,360	36	14
1938-----	11,640	348	67	17,390	401	193	12,420	363	124	3,890	113	37
1937-----	5,280	178	41	11,180	243	118	9,870	241	110	3,150	104	29
1936-----	6,740	211	18	12,270	285	145	6,680	213	52	2,060	50	22
1935-----	5,900	168	52	12,900	266	165	10,080	255	90	3,200	85	33
1934-----	10,950	250	125	8,720	168	116	4,260	107	41	1,840	38	22
1933-----	6,130	286	44	9,780	313	86	16,700	403	200	6,890	202	49
1932-----	5,610	160	61	11,600	240	131	9,100	206	81	2,790	76	29
1931-----	3,620	176	36	7,260	214	51	2,260	61	29	1,060	28	12
1930-----	-----	-----	-----	7,007	166	86	4,142	110	41	1,599	40	17
1929-----	-----	-----	-----	8,551	250	64	6,512	152	63	2,279	58	22
1928-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	2,267	60	25
1927-----	-----	-----	-----	5,078	142	51	2,071	51	18	879	18	11
1926-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	63	29	29
1925-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	2,535	-----	-----

STREAM FLOW NORTH FORK AHIANUM CREEK, YAKIMA INDIAN RESERVATION, WASHINGTON., FROM OFFICIAL RECORDS OF U. S. GEOLOGICAL SURVEY

Year	April			May			June			July			August			September		
	Total (acre- feet)	Sec. feet		Total (acre- feet)	Sec. feet		Total (acre- feet)	Sec. feet		Total (acre- feet)	Sec. feet		Total (acre- feet)	Sec. feet		Total (acre- feet)	Sec. feet	
		Max.	Min.		Max.	Min.		Max.	Min.		Max.	Min.		Max.	Min.		Max.	Min.
1924.....	-----	-----	-----	10,400	286	92	3,360	92	32	1,440	30	18	990	18	13	809	16	12
1923.....	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----
1922.....	-----	-----	-----	12,200	411	106	12,000	379	81	5,130	176	42	1,950	42	23	1,140	24	16
1921.....	9,280	190	117	18,800	480	115	18,400	480	186	2,760	77	31	1,430	30	17	1,020	25	11
1920.....	2,700	70	27	6,820	173	68	5,080	122	54	5,480	177	42	1,860	41	23	1,320	25	20
1919.....	-----	-----	-----	11,600	331	124	8,570	193	96	1,910	56	19	1,060	27	15	1,040	29	14
1918.....	-----	-----	-----	9,840	238	108	9,040	263	62	3,440	94	32	1,580	32	22	1,390	31	20
1917.....	2,600	76	20	12,200	376	63	16,600	332	215	2,320	56	27	1,480	28	19	1,120	22	18
1916.....	-----	-----	-----	17,600	-----	-----	24,900	-----	-----	6,950	220	47	2,000	45	25	1,380	33	19
1915.....	9,940	244	133	9,120	178	111	4,810	126	40	13,900	-----	-----	3,730	-----	-----	2,050	40	30
1914.....	13,300	321	82	15,300	307	212	9,340	275	92	1,840	39	22	1,160	24	16	946	18	14
1913.....	6,550	178	40	13,300	338	122	14,300	427	143	3,350	92	33	1,540	32	21	1,380	39	20
1912.....	10,500	272	145	23,700	629	197	12,100	367	92	5,450	138	42	1,940	40	25	1,560	46	23
1911.....	7,560	272	87	9,590	272	106	12,900	411	103	3,060	92	33	1,730	37	21	1,480	41	21
1910.....	13,200	-----	-----	15,100	-----	-----	7,440	215	68	3,490	103	31	1,110	31	22	1,310	-----	-----
1909.....	-----	-----	-----	-----	-----	-----	7,440	215	68	2,710	62	23	1,330	23	17	1,680	31	23
1908.....	-----	-----	-----	8,790	172	107	11,200	361	116	3,700	108	35	1,760	35	24	1,270	26	14
1907.....	-----	-----	-----	-----	-----	-----	10,300	252	122	5,400	155	44	2,020	44	27	1,340	27	20
-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	1,610	27	27

STREAM FLOW SOUTH FORK ANTHANUM CREEK, YAFIMA INDIAN RESERVATION, WASHINGTON, FROM OFFICIAL RECORDS OF U. S. GEOLOGICAL SURVEY

Year	April			May			June			July			August			September		
	Total (acre-feet)		Sec. feet	Total (acre-feet)		Sec. feet	Total (acre-feet)		Sec. feet	Total (acre-feet)		Sec. feet	Total (acre-feet)		Sec. feet	Total (acre-feet)		Sec. feet
	Max.	Min.		Max.	Min.		Max.	Min.		Max.	Min.		Max.	Min.		Max.	Min.	
1947	1,670	16	45	3,250	66	44	1,710	44	15	687	14	9	456	9	6	406	27	6
1946	1,490	14	40	3,120	77	26	2,260	59	25	920	23	10	496	10	7	387	10	6
1945	996	10	27	1,980	40	23	1,270	36	11	503	11	6	352	7	5	243	5	5
1944	746	17	10	1,250	24	15	749	19	9	384	8	5	266	5	4	220	4	3
1943	3,540	92	37	2,900	89	26	3,770	85	43	1,510	41	14	733	15	10	500	10	8
1942	2,140	47	25	2,200	64	22	1,510	38	15	646	14	8	416	8	6	331	6	5
1941	1,380	29	18	1,370	29	17	657	16	8	366	8	5	311	5	5	278	6	4
1940	1,540	32	20	2,280	45	26	939	27	9	445	9	6	290	6	4	256	5	4
1939	1,070	25	14	1,810	34	24	857	24	9	411	9	5	270	5	4	226	5	3
1938	3,690	124	26	4,200	102	44	2,950	74	23	948	23	11	538	11	7	398	8	6
1937	2,380	101	19	2,810	60	31	2,210	55	24	792	25	8	418	8	5	360	8	5
1936	1,660	46	6	2,950	76	30	1,710	52	14	613	14	6	353	7	5	343	7	5
1935	1,810	43	20	3,480	74	42	2,620	71	22	887	21	11	546	11	7	408	7	6
1934	3,230	76	35	2,230	54	24	2,620	24	12	524	11	7	352	8	5	314	7	4
1933	1,760	62	15	2,280	72	24	4,290	110	44	1,400	39	13	664	14	9	474	9	7
1932	1,400	32	17	2,830	58	34	1,890	43	17	769	17	9	490	10	7	374	7	6
1931	762	29	8	1,340	36	10	548	20	7	312	7	4	219	4	3	224	5	4
1930	1,398	33	17	1,522	29	20	780	19	9	448	9	6	277	6	3	324	5	4
1929	709	18	9	1,786	52	15	1,332	32	12	536	11	6	325	6	4	377	7	6
1928							1,511	44	15	640	16	8	473	9	6	377	7	6
1927													679	13	10	570	11	8
1926				1,109	31	11	498	11	6	302	6	3	206	4	3	199	4	3
1925	1,875	50	16	3,236	83	29	1,511	40	18	761	18	9	425	8	6			
1924				2,470	60	24	839	21	10	432	9	5	311	5	4	265	5	4
1923	2,950	33	70	3,750	90	35	2,680	67	27	1,440	37	15	707	15	9	464	9	8
1922	1,740	47	17	3,390	131	28	3,870	144	21	775	18	10	496	10	6	358	7	5
1921	2,530	62	35	5,360	144	31	4,980	151	35	1,200	32	13	621	13	8	491	9	8
1920	774	26	8	1,570	33	17	994	21	11	476	11	5	316	7	4	309	9	5

STREAM FLOW SOUTH FORK AHTANUM CREEK, YAKIMA INDIAN RESERVATION, WASHINGTON., FROM OFFICIAL RECORDS OF U. S. GEOLOGICAL SURVEY

Year	April			May			June			July			August			September		
	Total (acre- feet)	Sec. feet		Total (acre- feet)	Sec. feet		Total (acre- feet)	Sec. feet		Total (acre- feet)	Sec. feet		Total (acre- feet)	Sec. feet		Total (acre- feet)	Sec. feet	
		Max.	Min.		Max.	Min.		Max.	Min.		Max.	Min.		Max.	Min.		Max.	Min.
1919.....	2,230	59	23	2,980	84	33	1,800	46	18	744	18	9	464	9	6	395	8	6
1918.....	.....	.....	.....	2,530	50	35	1,900	47	16	713	20	9	528	11	7	389	7	6
1917.....	946	26	9	2,670	94	21	3,830	90	42	1,280	40	12	595	12	8	506	10	8
1916.....	5,260	.....	.....	6,632	.....	.....	6,660	203	76	3,390	92	26	1,140	25	14	762	15	11
1915.....	2,540	62	33	1,900	36	26	1,040	25	11	561	11	7	408	8	5	306	6	4

SOUTH FORK OF AHTANUM RIVER—SHANNAFELT RANCH																		
1914.....	5,660	125	52	6,580	154	67	2,510	70	21	652	20	6	351	7	4	317	6	4
1913.....	2,170	55	14	4,140	153	25	4,670	142	35	990	34	7	449	8	6	416	8	7
1912.....	2,150	52	27	3,160	74	27	1,740	42	13	688	15	7	460	9	6	371	9	5
1911.....	1,340	45	15	1,700	43	19	2,750	113	20	652	19	6	220	6	1	296	12	1
1910.....	3,770	124	38	5,340	148	44	1,560	42	17	658	16	8	357	8	4	333	6	4
1909.....	1,800	43	20	2,500	61	26	3,120	150	18	521	15	5	304	5	4	257	5	4
1908.....	.....	.....	.....	3,520	73	45	4,470	120	32	1,570	32	15	695	15	9	540	11	8

STREAM FLOWS AND CANAL DIVERSIONS, AHTANUM IRRIGATION SYSTEM, YAKIMA INDIAN RESERVATION, WASHINGTON, FROM OFFICIAL RECORDS OF
WATATO IRRIGATION PROJECT

79

Years	Irrigated area	April			May			June			July			August			September		
		Total flow (acre-feet)	Per-centage	Total diversion (acre-feet)	Total flow (acre-feet)	Per-centage	Total diversion (acre-feet)	Total flow (acre-feet)	Per-centage	Total diversion (acre-feet)	Total flow (acre-feet)	Per-centage	Total diversion (acre-feet)	Total flow (acre-feet)	Per-centage	Total diversion (acre-feet)	Total flow (acre-feet)	Per-centage	Total diversion (acre-feet)
1947	4 048	2,842	34	16,520	5,282	32	8,500	4,130	48	2,967	982	33	1,686	575	34	1,506	479	32	
1946	4,426	1,581	23	16,660	4,975	30	11,300	4,745	42	4,490	1,916	43	1,936	872	45	1,381	380	28	
1945	4,612	1,712	35	10,910	4,937	45	6,840	3,779	55	1,973	884	45	1,241	513	41	1,091	449	41	
1944	4,724	2,084	60	6,530	2,592	40	3,809	1,524	40	1,464	504	34	999	307	31	795	278	35	
1943	4,665	971	7	13,270	4,417	33	15,660	4,624	30	7,210	3,003	42	2,793	972	35	1,770	720	41	
1942	4,719	2,715	27	11,000	4,498	41	7,770	3,618	47	2,956	976	33	1,496	551	37	1,134	451	40	
1941	4,678	2,908	36	7,910	2,676	34	4,197	1,702	41	1,626	607	37	1,233	368	30	1,081	358	33	
1940	4,655	3,273	39	12,590	4,737	38	5,789	2,680	46	2,025	579	29	1,264	398	31	1,079	365	34	
1939	4,157	1,905	32	8,600	2,989	35	4,447	1,785	40	1,771	575	32	1,099	345	31	949	306	32	
1938	4,562	807	6	21,590	4,746	21	15,370	4,467	29	4,838	1,775	37	2,398	603	26	1,548	446	29	
1937	4,436	577	8	13,990	4,569	33	12,080	4,125	34	3,942	1,597	41	1,828	488	27	1,510	488	32	
1936	3,980	2,086	25	15,220	4,590	30	8,390	3,090	37	2,673	757	28	1,413	430	30	1,238	468	38	
1935	4,094	7,710	30	16,380	4,686	29	12,700	4,344	34	4,087	1,464	36	2,046	565	28	1,404	476	34	
1934	4,050	4,237	30	10,950	4,655	43	5,218	2,001	38	2,364	694	29	1,462	375	26	1,284	351	27	
1933	3,404	1,262	16	12,060	4,467	37	20,990	5,062	24	8,290	3,328	40	2,764	652	24	1,844	488	26	
1932	3,799	2,091	30	14,430	4,620	32	10,990	4,066	37	3,559	1,059	30	1,800	520	29	1,272	365	29	
1931	4,344	1,477	34	8,600	2,867	33	2,808	912	32	1,372	391	28	859	217	25	789	130	16	
1930	4,488	(1)		8,529			4,922			2,047			1,227			984			
1929	4,515	(1)		10,337			7,844			2,815			1,406			1,092			
1928	4,529	(1)								2,927			1,663			1,270			
1927	4,556	(1)											2,603			2,087			
1926	4,447	(1)		6,187			2,569			1,181			823			659			
1925	4,757	(1)								3,296			939						
1924	4,655	(1)		12,870			4,199			1,872			1,301			1,074			
1923	4,719	(1)								6,570			2,657			1,604			

1 No records.

STREAM FLOWS AND CANAL DIVERSIONS AHTANUM IRRIGATION SYSTEM YAKIMA INDIAN RESERVATION,--WASHINGTON, FROM OFFICIAL RECORDS OF WATATO IRRIGATION PROJECT

Years	April			May			June			July			August			September		
	Total flow (acre-feet)	Total diversion (acre-feet)	Per-cent	Total flow (acre-feet)	Total diversion (acre-feet)	Per-cent	Total flow (acre-feet)	Total diversion (acre-feet)	Per-cent	Total flow (acre-feet)	Total diversion (acre-feet)	Per-cent	Total flow (acre-feet)	Total diversion (acre-feet)	Per-cent	Total flow (acre-feet)	Total diversion (acre-feet)	Per-cent
1922	4,731	(1)		15,590			15,870			3,535			1,926			1,378		
1921	4,250	11,810	9	24,160		19	23,380	4,378	19	6,680	3,315	50	2,481	1,148	46	1,811	850	47
1920	4,681	3,474	50	8,390	1,732	45	6,074	2,668	44	2,386	983	41	1,376	515	37	1,349	421	31
1919	4,351	(1)		14,580			10,370			4,184			2,044			1,785		
1918	(1)	(1)		12,370			10,940			3,033			2,008			1,509		
1917	3,854	3,546	8	14,870	270	22	20,430	2,736	13	8,230	2,813	34	2,595	1,310	50	1,886	1,079	57
1916	(1)			24,232			31,560			17,200			4,870			2,812		
1915	3,100	12,480	12	11,020	1,467	28	5,850	2,378	41	2,401	1,163	48	1,568	629	40	1,252	508	41
1914	(1)	18,960	(1)	21,880			11,850			4,002			1,891			1,697		
1913	(1)	8,720	(1)	17,440			18,970			6,440			2,389			1,976		
1912	3,000	12,650	(1)	26,860			13,840			3,718			2,190			1,851		
1911	3,000	8,900	(1)	11,290			15,650			4,142			1,330			1,606		
1910	1,811	16,970	(1)	20,440			9,000			1,687			3,368			2,013		
1909	(1)						14,320			4,221			2,064			1,527		
1908	(1)			12,310			14,770			6,970			2,715			1,880		
1907	(1)																	

1 No records.

APPENDIX C

EXHIBITS

Plaintiff's Exhibit 1

Treaty between the United States and the Yakima Indians, signed at the Treaty Ground, Camp Stevens, Walla Walla Valley on June 9, 1855 (Indian Treaty No. 290); together with a Record of the official proceedings at the Council in the Walla Walla Valley, held jointly by Isaac I. Stevens, Governor and Superintendent Washington Territory and Joel Palmer, Superintendent Indian Affairs Oregon Territory on the part of the United States with the tribes of Indians named in the Treaties made at that Council, June 9th and 11th, 1855.

Plaintiff's Exhibit 1-a

Mimeographed copy of "A true copy of the Record of the official proceedings at the Council in the Walla Walla Valley, held jointly by Isaac I. Stevens Gov. & Supt. W. T. and Joel Palmer Supt. Indian Affairs O. T., on the part of the United States with the Tribes of Indians named in the Treaties made at that Council. June 9th and 11th, 1855".

Plaintiff's Exhibit 2-a-1

A letter dated April 14, 1892 from the Commissioner of Indian Affairs to John K. Rankin, Esq., U. S. Special Agent, Lawrence, Kansas, directing him to proceed to the Yakima Agency and Reservation for the purpose of making allotments to Indians on that Reservation.

Plaintiff's Exhibit 2-a-2

A letter dated April 18, 1892, to John K. Rankin, Esq., from the Acting Commissioner of Indian Affairs, transmitting to him the letter of instructions dated April 14, 1892 and the approval of the Acting Secretary of the Interior dated April 15, 1892.

Plaintiff's Exhibit 2-a-3

A letter dated April 15, 1892, from the Acting Secretary of the Interior to the Commissioner of Indian Affairs, approving the allotment instructions given to John K. Rankin, Esq., in the letter of April 14, 1892.

Plaintiff's Exhibit 2-a-4

A letter dated June 9, 1894, from John K. Rankin, U. S. Special and Disbg. Agt., reporting to the Commissioner of Indian Affairs in Washington, D. C., respecting the allotments which he made and submitting a schedule of allotments made pursuant to his instructions.

Plaintiff's Exhibit 2-b-1

A letter dated November 1, 1897, to William E. Casson, Esq., Special Allotting Agent, Burns, Oregon, from W. A. Jones, Commissioner of Indian Affairs, directing him to proceed to the Yakima Agency in Washington to assist in connection with making allotments to Indians residing on the Yakima Reservation.

Plaintiff's Exhibit 2-b-2

A letter dated January 30, 1905, to William E. Casson, Esq., Special Allotting Agent, Carson City, Nevada, from C. F. Larrabee, Acting Commissioner, advising him that he had been authorized to make

allotments under Section 2 of the Act of Congress of December 21, 1904, and setting forth the instructions for making the allotments on the Yakima Indian Reservation.

Plaintiff Exhibit 2-b-3

A letter dated February 1, 1905, to the Commissioner of Indian Affairs from E. A. Hitchcock, Secretary of the Interior, designating William E. Casson as Special Allotting Agent to make allotments on the Yakima Indian Reservation and to proceed in accordance with instructions given to him by the Commissioner of Indian Affairs.

Plaintiff's Exhibit 2-c-1

A letter dated May 26, 1910, from R. G. Valentine, Commissioner, approved by Frank Pierce, First Assistant Secretary of the Interior, to Matthew F. Nourse, Esq., Special Allotting Agent, Tekoa, Washington, directing him to proceed to the Yakima Reservation and to make allotments to the Indians residing on that reservation.

Plaintiff's Exhibit 2-c-2

A letter dated July 23, 1910, from C. F. Hauke, Second Assistant Commissioner, approved by Frank Pierce, First Assistant Secretary, to M. F. Nourse, Esq., Special Allotting Agent, Ft. Simcoe, Washington, giving him further instructions respecting the allotment of lands within the Yakima Indian Reservation.

Plaintiff's Exhibit 2-c-3

A letter dated May 10, 1911, to M. F. Nourse, Special Allotting Agent, White Swan, Washington, from C. F. Hauke, Second Assistant Commissioner,

setting forth further instructions respecting the allotment of lands in the Yakima Reservation.

Plaintiff's Exhibit 2-c-4

A letter dated July 23, 1912, from C. F. Hauke, Second Assistant Commissioner, to Matthew F. Nourse, Special Allotting Agent, Mabton, Washington, giving additional instructions respecting the allotment of lands on the Yakima Indian Reservation.

Plaintiff's Exhibit 2-c-5

A letter of September 8, 1913, from Cato Sells, Commissioner, to M. F. Nourse, Special Allotting Agent, giving him further instructions respecting the allotment of lands within the Yakima Indian Reservation.

Plaintiff's Exhibit 2-d

A letter of June 19, 1914, to Don M. Carr, Supt. Yakima School, from C. F. Hauke, Second Assistant Commissioner, in connection with making allotments on the Yakima Indian Reservation.

Plaintiff's Exhibit 3-a

Pages 28, 30, 31, 32, 33, 49, 51, 56, 59, 61 and 62, from Volume 23, Schedules of Allotments, Yakima Reservation, Washington, Office of Indian Affairs.

Plaintiff's Exhibit 3-b

Pages 67, 84, 86, 91 and 92, from Volume 23, Schedules of Allotments, Yakima Reservation, Washington, Office of Indian Affairs.

Plaintiff's Exhibit 3-c

Pages 104, 106, 108, 114, 115, 124, 128, 132, and 133, from Volume 23, Schedules of Allotments, Yakima Reservation, Washington, Office of Indian Affairs.

Plaintiff's Exhibit 3-d

Pages 13, 14, 15, 22, 33, 34, 53, 59, 67, 80, 81 and 82, from Volume 80H, Schedules of Allotments, Yakima Reservation, Washintgon, Office of Indian Affairs.

Plaintiff's Exhibit 3-e

Pages 1, 14 and 15, from Volume 80H, Schedules of Allotments, Yakima Reservation, Washington, Office of Indian Affairs.

Plaintiff's Exhibit 4-a Withdrawn

Typewritten list of trust allotments on south side of Ahtanum Creek showing allotment numbers, name of original allottee, land description and gross area.

Plaintiff's Exhibit 4-b

Certified copies of trust patents.

Plaintiff's Exhibit 4-c Withdrawn

List of fee patents, issued on lands south of Ahtanum Creek within Ahtanum Indian Irrigation Project showing allotment number, land description and gross area.

Plaintiff's Exhibit 4-d

Certified copies of fee patents.

Plaintiff's Exhibit 4-e

Tabulation showing water diversions and irrigated areas along Ahtanum Creek within boundaries of Yakima Indian Reservation, Washington.

Plaintiff's Exhibit 5-a

Map showing Ahtanum Irrigation System ownership south side of Ahtanum Creek.

Plaintiff's Exhibit 5-b

Map showing development Ahtanum Indian Irrigation Project System.

Plaintiff's Exhibit 5-c Withdrawn

Map showing names of owners of lands when allotted duplicate of Exhibit 5-a with addition that names of Indians owners being added or names of record of last non-Indian owner.

Plaintiff's Exhibit 5-d

Map showing irrigable and non-irrigable lands south of Ahtanum Creek in Yakima Indian Reservation.

Plaintiff's Exhibit 5-e Withdrawn

Map disclosing irrigation ditches from Ahtanum River—1915.

Plaintiff's Exhibit 5-f

Map showing irrigation ditches from Ahtanum River, Yakima County, Washington, May 1907.

Plaintiff's Exhibit 5-g Withdrawn

Map showing the canal system on the south side of Ahtanum Creek as of October 1949.

Plaintiff's Exhibit 5-h Withdrawn

Map showing land ownership south of Ahtanum Creek.

*Plaintiff's Exhibit 5-i Withdrawn**Plaintiff's Exhibit 5-j Withdrawn**Plaintiff's Exhibit 5-k Withdrawn*

Map showing Ahtanum (Indian Irrigation) Project dated May 1950—United States Indian Service,

Yakima Reservation, Washington, Department of the Interior.

Plaintiff's Exhibit 5-l

Aerial photograph showing a portion of Ahtanum Valley and diversion ditches on the south side of Ahtanum Creek.

Plaintiff's Exhibit 5-m

Withdrawn and request it be re-designated Plaintiff's Exhibit 7-a.

Plaintiff's Exhibit 5-n

Withdrawn and request it be re-designated Plaintiff's Exhibit 7-b.

Plaintiff's Exhibit 5-x

Reserved.

Plaintiff's Exhibit 6-a

Photostat copies of the original records of the United States Geological Survey showing daily gauge heights and discharges, also calculated monthly run offs per square mile, run off depth in inches and run off in acre feet for the South Fork of Ahtanum Creek, gauge for which was located at Shannafelt Ranch near Tampico, Washington, for the years 1908 to 1914 inclusive.

Plaintiff's Exhibit 6-b

Photostat copies of the original records of the United States Geological Survey showing daily gauge heights and discharges, also calculated monthly run offs per square mile, run off depth in inches and run off in acre feet for the South Fork of Ahtanum Creek, gauge for which was located at Conrads Ranch, for the years 1915 to 1924 inclusive, and for the years 1931 to 1947 inclusive.

Plaintiff's Exhibit 6-c

Photostat copies of the original records of the United States Geological Survey showing daily gauge heights and discharges, also calculated monthly run offs per square mile, run off depth in inches and run off in acre feet and gauge being located on Ahtanum Creek near The Narrows near Tampico, Washington, for the years 1908 to 1913 inclusive. (The flows shown on these sheets are for the main stem of Ahtanum Creek which includes the flows from both the north fork and south fork.)

Plaintiff's Exhibit 6-d

Photostat copies of the original records of the United States Geological Survey showing daily gauge heights and discharges, also calculated monthly run offs per square mile, run off depth in inches and run off in acre feet for the North Fork of Ahtanum Creek, the gauge for which was located near Tampico, Washington for the years 1907 to 1924 inclusive and 1931 to 1947 inclusive.

Plaintiff's Exhibit 6-e

Photostat copies of the original records of the United States Geological Survey showing daily gauge heights and discharges, also calculated monthly run offs per square mile, run off depth in inches and run off in acre feet for Ahtanum Creek from a gauging station near the town of Yakima City, Washington (Union Gap) for the years 1904, 1907, 1908, 1910, 1911, and 1912. (These records are taken on the main stem of Ahtanum Creek and show the records of the lower end of the stream after all diversions are made.)

Plaintiff's Exhibit 6-f

Tabulation stream flow north fork Ahtanum Creek; stream flow south fork Ahtanum Creek; stream flows and canal diversions; tabulation diversions Ahtanum main canal, Ahtanum lower canal for first and second half irrigation seasons.

Plaintiff's Exhibit 7

Soil survey maps and analysis for each individual allotment together with accompanying tabulation for which rights to the use of water is being claimed. Substitute of corrected copy of exhibit being made.

Plaintiff's Exhibit 7-a

Aerial photograph, colored, showing land classifications in a portion of Ahtanum Valley on the south side of Ahtanum Creek with appropriate soil classification legend.

Plaintiff's Exhibit 7-b

Map showing area on south side of Ahtanum Creek showing the various classes of soil, colored appropriately in accordance with legend.

Plaintiff's Exhibit 8

Munn v. Redman, No. 3794, Superior Court, County of Yakima, State of Washington—Copy of temporary restraining order, August 18, 1906; amended complaint, August 18, 1906; answer of defendant W. H. Redman dated October 26, 1906 all certified to by the County Clerk and ex officio clerk of the Superior Court, County of Yakima, State of Washington on the 7th day of February, 1949.

Plaintiff's Exhibit 9

Hearing Before the Committee on Indian Affairs, United States Senate, 72 Congress, 1st Session, S.

3998, A Bill Approving and Confirming for Apportionment of Ahtanum Creek, Washington, between Yakima Indian Reservation and Lands North Thereof, dated May 9, 1908.

Plaintiff's Exhibit 10 Withdrawn

Plaintiff's Exhibit 11

Exhibits 11-1 through 11-146. Correspondence from The Archives, Department of Justice and the Department of the Interior, all of which pertain to the continuing conflict respecting the apportionment of the available supply of water from Ahtanum Creek. Set forth on the following pages is a synopsis of the content together with designation of data contained in the exhibits in question.

EXHIBITS

Plaintiff's Exhibit 11-1 to 11-146 Incl.

11-1. A letter dated August 23, 1906, to the Attorney General from the Acting Secretary of the Interior, transmitting a copy of a letter dated August 15, 1906, from the Acting Commissioner of the Office of Indian Affairs to the Secretary of the Interior advising that an injunction proceeding had been instituted against one of the officials of the United States in charge of diverting water from Ahtanum Creek for use on the Yakima Indian Reservation, requesting the Attorney General to take such action as he deems necessary and advisable in the premises.

11-2. Copy of a letter dated August 25, 1906, from the Acting Attorney General to the Secretary of the Interior, acknowledging receipt of the latter official's letter of August 23, 1906, advising that the United States Attorney for the Eastern District of Washington had been directed to take all action necessary to

protect the interests of the Government and the Indians in the matter of the injunction against the officials on the Yakima Indian Reservation, involving diversion of water from Ahtanum Creek.

11-3. Copy of telegram dated August 25, 1906, from the Attorney General to the United States Attorney in Spokane, Washington, directing him to take all action necessary to protect the interests of the United States and the Indians in the injunction against the officials on the Yakima Indian Reservation, involving diversion of water from Ahtanum Creek.

11-4. A letter dated August 31, 1906, from the Acting Secretary of the Department of the Interior to the Attorney General, transmitting to the Attorney General a copy of a letter dated August 27, 1906, from the Commissioner of the Office of Indian Affairs to the Secretary of the Interior, reporting further on the injunction proceedings which had been instituted against the official of the United States in charge of diverting water from Ahtanum Creek to the Yakima Indian Reservation.

11-5. A copy of a telegram dated August 31, 1906, from the Acting Attorney General to the United States Attorney in Spokane, directing him to confer with the Superintendent of the Yakima Indian Reservation, and to take all action necessary to protect the interests of the United States.

11-6. A letter dated October 24, 1907, from James Rudolph Garfield, Secretary of the Department of the Interior, to the Commissioner of the Office of Indian Affairs, delivering to him a report of the Chief Engineer of the Office of Indian Affairs, bearing upon the dispute existing between the present users of the north side of Ahtanum Creek and the Government on behalf of the Reservation. Report of

Chief Engineer accompanying that later dated October 17, 1907.

11-7. A letter dated October 30, 1906, from A. G. Avery, United States Attorney, to the Attorney General, reporting on the case of *David Munn v. W. H. Redman, et al.*, in the Superior Court for Yakima County, Washington, the suit involving the injunction proceedings against an official of the United States in charge of diverting water from Ahtanum Creek for use on the Yakima Indian Reservation. Accompanying that letter is a statement from H. J. Snively, Attorney from Plaintiff Munn in the case last mentioned, reporting the objects for which the suit was brought. Likewise, accompanying Mr. Avery's letter is a copy of the order entered on August 18, 1906, purporting to enjoin the official of the United States from diverting water from Ahtanum Creek. There is likewise transmitted a copy of the complaint filed in the case of *Munn v. Redman* which complaint was signed by Attorney for Plaintiff H. J. Snively. Likewise accompanying the letter in question is the answer of Defendant, W. H. Redman, the official of the United States against whom the injunction proceeding was instituted. That answer was signed by A. G. Avery and J. B. Lindsley as attorneys for the defendant W. H. Redman. However, the appearance by counsel last mentioned was not on behalf of the United States but rather appearance by those attorneys in their individual capacity.

11-8. A copy of a letter dated November 16, 1906, from the Acting Attorney General to A. G. Avery, United States Attorney, Spokane, Washington, approving the action taken by the United States Attorney in answering the complaint in the case of *Munn v. Redman*.

11-9. A letter dated May 24, 1907, from A. G. Avery to the Attorney General reporting the status of the case of *Munn v. Redman*, adding that the case will probably be heard on its merits. Mr. Avery suggests the water problem will not be settled until a suit in court is commenced by the Government. He requests instruction re such a suit.

11-10. A copy of a letter dated June 13, 1907, from the Attorney General to the Secretary of the Interior, transmitting to that official a copy of the letter from A. G. Avery dated May 24, 1907, referring especially to the suggestion of the United States Attorney that an action be brought by the United States to enjoin the use of the waters of Ahtanum Creek by the white water users involved in this action.

11-11. A letter dated June 18, 1907, from George W. Woodruff, Acting Secretary of the Interior, to the Attorney General, referring to the recommendation of A. G. Avery made in his letter of May 24, 1907, that a suit should be instituted. In the final paragraph of this letter the statement is made that it is of the greatest importance that the rights of the Government and the Indians to the use of water of Ahtanum Creek should be determined as soon as possible, adding that the course suggested seems to be the feasible one for that purpose.

11-12. A copy of a letter dated June 20, 1907, from the Attorney General to A. G. Avery, United States Attorney in Spokane, Washington, stating that it is of the greatest importance that a suit be instituted to adjudicate the waters of Ahtanum Creek as soon as possible.

11-13. A letter dated July 22, 1907, from A. G. Avery, United States Attorney in Spokane, to the Attorney General transmitting to him a copy of a bill to be used for the institution of the suit to

adjudicate the rights to the use of water of Ahtanum Creek in accordance with his earlier recommendation, and requesting if the form of the bill is approved, that the Attorney General affix his signature to it and return the bill for filing.

11-14. A copy of a letter of July 30, 1907, from the Attorney General to A. G. Avery, United States Attorney, Spokane, Washington, transmitting to him a copy of the bill duly signed for use in the institution of a suit to adjudicate the rights to the use of water from Ahtanum Creek, and directing the United States Attorney to secure the names of the defendants, and set them forth in the complaint.

11-15. A letter dated August 8, 1907, from James E. Wilson, Acting Secretary of Interior, to the Attorney General requesting that a copy of the bill prepared by A. G. Avery for the adjudication of rights to the use of water be transmitted to the Department of the Interior.

11-16. A copy of a letter dated August 10, 1907 from the Attorney General to the Secretary of the Interior transmitting to him a copy of the bill prepared for use in the adjudication of rights to the use of water from Ahtanum Creek.

11-17. A copy of a telegram dated August 12, 1907 from the Attorney General to the United States Attorney at Spokane, advising him that unless the statute of limitations or some other question prevents, the bill of equity submitted to him in connection with the Ahtanum Creek matter should not be filed until further notice.

11-18. A copy of a letter dated October 28, 1907, from the Commissioner of the Office of Indian Affairs to the Superintendent in charge of the Yakima Agency, directing him to confer with Attorney Snively for the purpose of effectuating if possible an adjust-

ment out of court of the rights to the use of water of Ahtanum Creek.

11-19. A letter dated January 10, 1908 from Jay Lynch, Superintendent and S. D. A., to the Commissioner of Indian Affairs stating that he will undertake to bring about a settlement of the dispute over rights to the use of water from Ahtanum Creek, together with a copy of a letter dated January 9, 1908 from Mr. Lynch to A. G. Avery, U. S. Attorney.

11-20. A copy of a newspaper report bearing stamp of the Office of Indians Affairs of March 11, 1908, stating that the Ahtanum Creek ranchers on the north side of the stream have selected a committee to represent them for the purpose of bringing about a settlement of the dispute over rights to the use of water from Ahtanum Creek.

11-21. A letter dated April 9, 1908, from Jay Lynch, Superintendent and S. D. A., to the Commissioner of Indian Affairs, requesting that Chief Engineer Code be directed to go to the Yakima Indian Reservation to confer with the Committee of white water users for the purpose of bringing about a settlement of the rights to the use of water from Ahtanum Creek.

11-22. A copy of a telegram dated April 11, 1908, from Lynch, Superintendent of the Yakima Indian Agency, reporting that a committee had been empowered to attempt to effectuate a settlement and recommending that Mr. Code, Chief Engineer, be sent as soon as possible with instructions in regard to a settlement of the question.

11-23. A letter dated April 13, 1908, from James Rudolph Garfield, Secretary of Interior, to W. H. Code, Chief Engineer, at the Yakima Agency, in regard to the steps to be taken in connection with the settlement of the dispute over rights to the use of water from Ahtanum Creek.

11-24. A telegram dated April 13, 1908, signed by the Secretary of Interior to Code, Chief Engineer, directing him to proceed to the Yakima Agency in connection with the dispute over rights to the use of water from Ahtanum Creek.

11-25. A letter dated May 4, 1908, from the Secretary of the Interior to the Commissioner of Indian Affairs, transmitting to him a copy of a report from Chief Engineer Code, relative to the dispute over rights to the use of water from Ahtanum Creek.

11-26. A letter dated May 5, 1908, from the Acting Commissioner of the Office of Indian Affairs to the Secretary of the Interior, approving a proposed settlement of the Ahtanum Creek dispute which was submitted by Chief Engineer Code; accompanying this letter was a proposed wire dated May 5, 1908, advising Code that the proposed settlement was approved.

11-27. The memorandum of agreement dated May 9, 1908, between the United States of America, acting through W. H. Code, Chief Engineer of Irrigation, Indian Bureau, together with numerous white users of water from Ahtanum Creek, pursuant to which the waters of Ahtanum Creek were divided as follows: The Yakima Indians to receive 25% of the natural flow of the creek and the white water users to receive 75% of the natural flow of that stream. The instrument, in addition to being signed by W. H. Code, was approved by Frank Pierce, First Assistant Secretary of the Interior on the 30th day of June, 1908.

11-28. A letter dated June 27, 1908, to the Secretary of the Interior from the Acting Commissioner of Indian Affairs, reporting negotiations respecting the dispute over rights to the use of water from Ahtanum Creek and transmitting a copy of a special Power of Attorney certified by the County Recorder for Yak-

ima County, pursuant to which the representatives of the white water users were empowered to execute the agreement of May 9, 1908. Likewise accompanying that letter was a letter of June 20, 1908 from Jay Lynch, Superintendent and S. D. A. transmitting to the Commissioner of Indian Affairs a certified copy of the Special Power of Attorney to which reference has been made.

11-29. A letter dated August 21, 1908, from James E. Wilson, Acting Secretary of Interior to the Commissioner of Indian Affairs, referring to the bill of complaint prepared in connection with the case of *Munn v. Redman* requesting that report be made as to the status of the matter.

11-30. A letter dated August 22, 1908, from the Commissioner of Indian Affairs, responding to the Secretary of the Interior's letter of August 21, reporting on the status of the dispute over rights to the use of waters from Ahtanum Creek, and reporting that the agreement purportedly compromising the dispute had been approved.

11-31. A letter dated March 20, 1912, from the United States Attorney, Spokane, Washington, to the Attorney General, reporting that a motion had been filed to dismiss the case of *Munn v. Redman*.

11-32. A letter dated July 15, 1912, to the Attorney General from five Yakima Indians and their corresponding secretary, Louis Mann, requesting that the Attorney General institute a suit in the proper courts of the United States to determine the rights of the Yakima Indians in the Yakima River and in Ahtanum River.

11-33. A copy of a letter dated September 25, 1912, from the Acting Attorney General to Louis Mann, corresponding secretary for the Yakima Indians responding to their letter of July 15, 1912, re-

questing that the Indians submit to the Attorney General additional information on the subject.

11-34. A letter dated October 28, 1912, to the Attorney General from Louis Mann, corresponding secretary, Yakima Indian Council Lodge, reporting in full the situation respecting their claims to water from the Yakima River and from Ahtanum Creek.

11-35. A copy of a letter dated November 16, 1912, from Assistant Attorney General Knaebel to the Secretary of the Interior requesting a recommendation respecting the petition of six allottees of the Yakima Confederated Tribes of Indians that suit be instituted immediately to determine the rights of the said tribes to the waters of Ahtanum and Yakima Rivers.

11-36. A letter dated January 23, 1913, from the Secretary of the Interior to the Attorney General referring to the request by the Yakima Indians to the Attorney General that a suit be instituted to determine the rights of the Indians to the waters of Ahtanum and Yakima Rivers. The Secretary of the Interior states that such a proceeding should not be instituted for the reason that here was then before Congress Senate Bill 6693 which, if passed, would restore to the Indians the water rights to which they are entitled. Accompanying that letter was a copy of S. 6693, a bill "To provide water for irrigating lands of the Yakima Indian Reservation, Washington, and for other purposes." Also accompanying that letter was a copy of a letter from the Secretary of the Interior dated January 23, 1913, to Director of Reclamation Service and Commissioner of Indian Affairs, jointly, setting forth the Department's policy.

11-37. A memorandum of the Department of Justice dated January 30, 1913, referring to the legal soundness of the claim of the Yakima Indians

to water from Ahtanum Creek but stating that the responsibility for bringing this suit resided with the Department of Interior and that they had requested that no suit be brought.

11-38. A copy of a letter dated February 14, 1913, from the Assistant Attorney General to Louis Mann, corresponding secretary, Yakima Indian Council Lodge, advising him that the matter had been sub-submitted to the Secretary of the Interior, who had recommended that no proceedings be instituted at this time.

11-39. A letter dated November 2, 1918, from L. M. Holt, Supervising Engineer at Yakima Reservation, to the Commissioner of Indian Affairs, reporting on the status of rights to the use of water from Ahtanum Creek and reporting on the administration of the rights to the use of water under the agreement of 1908. There was enclosed a copy of letter dated October 15, 1918, from Mr. Holt to Marvin Chase, State Hydraulic Engineer, Olympia, Washington, referring to the dispute between the white water users and the Indians on the Yakima Indian Reservation.

11-40. A letter dated September 5, 1923, from W. M. Reed, Chief Engineer, to the Commissioner of Indian Affairs, suggesting that action be taken toward the preparation of suit to adjudicate rights to the use of water from Ahtanum Creek.

11-41. A petition received in the Department of Interior September 11, 1923, from Indians on the Yakima Indian Reservation, requesting the Secretary of the Interior to take the requisite steps to procure an adjudication of Ahtanum Creek.

11-42. A copy of a letter from Charles H. Burke, Commissioner, to L. M. Holt, Supervising Engineer, dated July 5, 1927, directing Mr. Holt to assume the

position that the Federal Government has exclusive control over the Indian lands and in accordance with a decision in the *Winters* case will demand sufficient water from Ahtanum Creek to supply the needs of the lands for irrigation.

11-43. A copy of a telegram to Commissioner of Indian Affairs from W. L. Jones, Senator, received in Office of Indian Affairs July 29, 1927, referring to the instructions from the Commissioner of Indian Affairs to Supervisor Holt relating to the claimants of the Yakima Reservation to water from Ahtanum Creek and stating that immediate steps should be taken to avoid a serious situation between the white water users and the Yakima Indians.

11-44. A letter dated August 2, 1927, from the State Supervisor of Hydraulics, Olympia, Washington, to the Acting Secretary of the Interior, referring to the failure of some to comply with the agreement of 1908, but stating that he believed the United States would take the proper position in regard to the division of waters of Ahtanum Creek.

11-45. A letter dated August 10, 1927, from L. M. Holt, Supervising Engineer, to Commissioner of Indian Affairs discussing wasteful methods of diversion used by white water users and stating he found nine different dams completely obstructing channel of Ahtanum Creek.

11-46. A letter dated September 8, 1927, from W. M. Reed, Chief Engineer, Los Angeles, California, to the Commissioner of Indian Affairs, in regard to rights to the use of water from Ahtanum Creek, in which it is reported that there was some consideration of instituting an adjudication suit for the purpose of determining the rights to the use of water from the stream in question.

11-47. A letter dated July 19, 1927, from the State Supervisor of Hydraulics, Olympia, Washington, to the Secretary of the Interior, reporting the dispute between water users on Ahtanum Creek and referring specifically to the agreement of May 9, 1908, purporting to settle the matter. Likewise referred to was the order of Commissioner Burke to Supervisor Holt directing him to claim water from Ahtanum Creek in quantities sufficient to irrigate the lands in the Indian Reservation susceptible of irrigation from that source, it is observed in that letter that the order to Holt was suspended at the request of Senator Jones. Accompanying the letter was a clipping from the Yakima Daily Republic reporting the dispute over Ahtanum Creek.

11-48. A letter dated June 29, 1928, from L. M. Holt, Supervising Engineer, to the Commissioner of Indian Affairs, reporting on the dispute over rights to the use of water from Ahtanum Creek and pointing out that it is impossible for him to get water in addition to that prescribed in the agreement of May 9, 1908.

11-49. A letter dated July 16, 1928, from L. M. Holt, Supervising Engineer, transmitting a clipping from the Yakima Sunday Herald of July 15, 1928, in regard to the white water users' distribution system, and pointing out the wasteful character of that system.

11-50. A letter dated January 25, 1929, from L. M. Holt, Supervising Engineer, to Commissioner of Indian Affairs, enclosing a topographic map showing part of the Klickitat, Ahtanum and Simcoe Creek watersheds. Mr. Holt reported on the possibility of securing water from other sources for the lands in need of water on the Yakima Indian Reservation.

11-51. A letter dated February 9, 1929, from the Superintendent of the Yakima Indian Agency to the

Commissioner of Indian Affairs, transmitting a petition signed by Yakima Indians, the petition being dated February 5, 1929, requesting that an investigation of a possible supply of water from the Klickitat River be undertaken.

11-52. A letter dated April 9, 1929, from C. R. Trowbridge, Inspector, to the Secretary of the Interior, enclosing a copy of an article in the Yakima Herald of March 23, 1929, referring to the controversy between the Yakima Indians and the white water users from Ahtanum Creek.

11-53. A letter dated April 19, 1929, from W. L. Jones, United States Senator, with enclosures, to the Commissioner of Indian Affairs, referring to the request by the Yakima Indians that there be undertaken an investigation to bring water from the Klickitat River to the Yakima Indian Reservation to supplement the existing supply.

11-54. A letter dated May 3, 1929, from the State Supervisor of Hydraulics, Olympia, Washington, to the Secretary of the Interior requesting that a disinterested hydrographer be appointed to measure the water of Ahtanum Creek in accordance with the agreement of May 9, 1908, a copy of which agreement accompanied the letter.

11-55. A letter dated May 6, 1929, from John H. Lynch, Secretary Ahtanum Irrigation District, to Honorable C. C. Dill, United States Senator, soliciting the aid of the Senator and Senator Jones to present the white water users' case before the Secretary of the Interior in connection with the dispute in regard to rights to the use of water from Ahtanum Creek.

11-56. A letter dated May 6, 1929, from John H. Lynch, Secretary Ahtanum Irrigation District, to the Secretary of the Interior, respecting the dispute over

rights to the use of water and transmitting to the Secretary of the Interior a copy of the letter of July 19, 1927, to the Secretary of the Interior from the State Supervisor of Hydraulics, Olympia, Washington, together with a copy of the agreement of May 9, 1908.

11-57. A letter dated May 7, 1929, from Senator C. C. Dill, to the Commissioner of Indian Affairs, enclosing a copy of a telegram from John H. Lynch, Secretary Ahtanum Irrigation District, reporting to the Senator that the Indian Bureau was disregarding a compromise agreement as to the rights to the use of water from Ahtanum Creek.

11-58. A petition received in the Department of Interior May 16, 1929, asking that action be taken for a redistribution of the water of Ahtanum Creek.

11-59. A letter dated May 18, 1929, from C. C. Dill to the Secretary of the Interior in regard to the dispute between white and Indian users over the right to the use of water from Ahtanum Creek, transmitting a copy of the telegram from John H. Lynch, Secretary of Ahtanum Irrigation District, dated May 17, 1929, to the Senator.

11-60. A letter dated May 20, 1929, from W. L. Jones, United States Senator to the Secretary of the Interior, bringing to his attention the dispute over rights to the use of water from Ahtanum Creek and stating that in his best judgment every effort should be made to bring about a satisfactory adjustment of the matter without resorting to the courts.

11-61. A telegram dated May 31, 1929, from John H. Lynch, Secretary of Ahtanum Irrigation District to the Secretary of the Interior, stating that the Indians are diverting about half of the flow of Ahtanum Creek and tha the ranchers will help themselves to water from that stream unless a cut of this diversion to one-quarter of the flow is made.

11-62. A letter dated June 13, 1929, from John H. Lynch, Secretary of Ahtanum Irrigation District to the Secretary of the Interior, transmitting a copy of Lynch's letter to the State District Watermaster for Yakima County, referring to his understanding that the Secretary of the Interior will undertake an investigation as to the facts and law on the subject of the dispute over rights to the use of water from Ahtanum Creek.

11-63. A letter dated June 24, 1929, from John H. Lynch, Secretary of Ahtanum Irrigation District, to the Secretary of the Interior, relative to an arrangement purporting to settle the dispute over the rights to divert water from Ahtanum Creek and transmitting a copy of a letter dated June 22, 1929, from John H. Lynch, Secretary, to the editor of the Morning Herald, Yakima, Washington.

11-64. A letter dated July 25, 1930, from Joseph M. Dixon, First Assistant Secretary of the Interior to the Attorney General, setting forth a copy of a wire dated June 24, 1930, from L. M. Holt, Supervising Engineer, Yakima Reservation, in regard to construction of a dam across Ahtanum Creek. There were enclosed with the letter to the Attorney General copies of the agreement of 1908, together with an opinion from the Solicitor of the Department of the Interior dated May 24, 1930 in regard to certain aspects of the agreement of May 9, 1908. The First Assistant Secretary states that there is a need for immediate action and requests that the Attorney General wire the United States Attorney to investigate the matter and to take such steps as the facts and the law of the case warrant.

11-65. A wire dated July 28, 1930, from John H. Lynch, Secretary of Ahtanum Irrigation District to the Secretary of the Interior, in regard to the destruc-

tion of the dam installed by the white water users and the posting of armed guards to prevent those white water users from diverting their share of the water.

11-66. A copy of a telegram dated July 30, 1930, from C. J. Rhoads to Holt, Indian Service, Yakima, Washington, reporting on telegram from Secretary of Ahtanum Irrigation District, respecting armed guards, directing Holt to report immediately.

11-67. Copy of telegram dated July 30, 1930, C. J. Rhoads to John H. Lynch, Secretary of Ahtanum Irrigation District, stating that it is believed that an equitable adjustment may be reached.

11-68. A letter dated July 30, 1930, from William D. Mitchell, Attorney General to the Secretary of the Interior, advising that on July 28, 1930, the United States Attorney for the Eastern District of Washington was instructed to investigate the Ahtanum Creek dispute, and to take appropriate steps to prevent construction of a dam across the stream in violation of rights of the Government as defined in the agreement of 1908.

11-69. A wire dated July 31, 1930, from Holt, Superintendent of Yakima Reservation, to the Commissioner of Indian Affairs, reporting dispute over rights to the use of water from Ahtanum Creek, stating that conference between Indian Service officials and state officials resulted in an agreement satisfactory to all, pending action of Department of Justice.

11-70. Letter dated August 2, 1930, from L. M. Holt to Commissioner of Indian Affairs, reporting on dispute over rights to the use of water of Ahtanum Creek.

11-71. Letter dated August 9, 1930, to the Secretary of the Interior from John H. Lynch, Secretary and Attorney for Ahtanum Irrigation District, reporting

in full in regard to the dispute over rights to the use of water from Ahtanum Creek and setting forth considerable data in regard to that dispute.

11-72. A letter dated August 13, 1930, from Senator C. C. Dill, to the Secretary of the Interior, and a copy of the response to Senator Dill, the response being dated August 25, 1930; both of which pertain to the dispute over rights to the use of water from Ahtanum Creek.

11-73. A copy of a letter dated August 25, 1930, to Senator Jones of the United States Senate, from John H. Edwards, Acting Secretary of the Interior, together with a carbon copy of a letter dated August 9, 1930, to Senator Jones, bearing the signature of John H. Lynch, Secretary and Attorney of the Ahtanum Irrigation District, and a copy of a letter dated August 9, 1930, addressed to the Secretary of the Interior and bearing the typewritten signature of John H. Lynch, Secretary and Attorney for Ahtanum Irrigation District. In this data there is set forth a considerable resume of the then pending dispute over rights to the use of water from Ahtanum Creek.

11-74. A copy of a letter dated August 25, 1930, to John W. Summers, from the Acting Secretary of the Interior, in regard to the dispute over rights to the use of water from Ahtanum Creek and referring to a letter from John H. Lynch to Mr. Summers pertaining to that question.

11-75. A letter dated October 4, 1930, from John H. Lynch, Secretary and Attorney for the Ahtanum Irrigation District to the Attorney General transmitting copy of a letter from John H. Edwards, Acting Secretary of the Interior to John H. Lynch, together with a copy of the power of attorney purporting to authorize the execution of the agreement of May 9,

1908. In Mr. Lynch's letter background in regard to the agreement in question is set forth in some detail.

11-76. A letter dated October 6, 1930, from C. C. Dill, United States Senator, to William D. Mitchell, Attorney General, transmitting to the Attorney General copy of a letter dated October 4, 1930 from John H. Lynch, Secretary and Attorney for the Ahtanum Irrigation District, in which Mr. Lynch refers to the efforts of the Senator to procure an actual consideration of this matter by the Secretary of the Interior and by the Attorney General.

11-77. A letter dated October 22, 1930, from Solicitor Finney of the Department of the Interior to G. A. Iverson, Land Division, Department of Justice, referring to the dispute over rights to the use of water from Ahtanum Creek and enclosing a copy of a memorandum from a member of his staff. In that letter Solicitor Finney states that the contention that the agreement of May 9, 1908 was beyond the scope of the authority of the Secretary of the Interior might be sustained.

11-78. A letter dated December 30, 1930, from the Attorney General to the Secretary of the Interior, transmitting a photostatic copy of the memorandum dated December 2, 1930 to Nugent Dodds, Acting Head, Criminal Division, Department of Justice, from J. E. Hoover, Director of Bureau of Investigation, submitting a report in regard to the dispute over rights to the use of water from Ahtanum Creek.

11-79. A telegram dated April 10, 1931, from Holt to the Commissioner of Indian Affairs, in regard to the desirability of reducing diversions to 25% of the flow pending final opinion in regard to construction of the agreement of May 9, 1908.

11-80. A letter dated April 27, 1931, from L. M. Holt, Supervising Engineer, Yakima Indian Reservation, to the Commissioner of Indian Affairs, referring to a copy of the Solicitor's opinion of March 18, 1931. Mr. Holt discusses at length his views in regard to the Solicitor's opinion.

11-81. An undated letter to the Secretary of the Interior from John H. Lynch, Secretary of Ahtanum Irrigation District, which was received in the Department of the Interior May 2, 1931, in which Mr. Lynch comments upon the Solicitor's opinion of March 18, 1931.

11-82. A wire dated May 3, 1931, from Erle J. Barnes, Director Conservation and Development, Olympia, Washington, stating that the Indian Service is ignoring the agreement of May 9, 1908, and commenting further upon that agreement.

11-83. A letter dated May 12, 1931, from Joseph M. Dixon, First Assistant Secretary of the Department of the Interior to the Attorney General of the United States, stating, among other things, that the parties interested in the conflict between the Yakima Indians and the white water users over rights to the use of water from Ahtanum Creek will not be satisfied until a court decision in the matter has been rendered, and requesting the Attorney General to institute a suit to quiet title in and to the waters of Ahtanum Creek and its tributaries.

11-84. A letter dated May 18, 1931, from William D. Mitchell, Attorney General, to the Secretary of the Interior, responding to the letter of First Assistant Secretary Dixon dated May 12, 1931, and advising that the United States Attorney at Spokane, Washington, had been instructed to prepare a bill of complaint for the purpose of bringing a suit to settle and determine the water rights of Ahtanum Creek.

11-85. A copy of a telegram dated May 21, 1931, from John H. Lynch, Secretary of Ahtanum Irrigation District, to W. L. Jones, Advising the Senator that the Ahtanum difficulty had been adjusted for that season.

11-86. A letter dated June 1, 1931 from Lawrence Richey, Secretary to the President, to the Attorney General, transmitting a copy of a telegram from Senator W. L. Jones to the President, in regard to the Ahtanum Creek dispute. Senator Jones stated to the President that it was imperative that orders be issued stopping any judicial proceeding for the current year respecting the rights on Ahtanum Creek.

11-87. A memorandum dated June 1, 1931 to Mr. Ely of the Office of the Secretary of the Interior from the Commissioner of Indian Affairs, transmitting a copy of a letter dated May 19, 1931, addressed to the President, and signed by the Director of the Department of Conservation and Development, Olympia, Washington, to which letter was attached a type-written copy of the agreement of May 9, 1908; a copy of a letter dated May 9, 1929, from the State Supervisor of Hydraulics to W. H. Code; a copy of an opinion dated June 7, 1929 from H. C. Finney, Solicitor of the Department of the Interior to the Secretary of Interior; a copy of a letter from W. H. Code dated September 9, 1929, to the Supervisor of Hydraulics, Olympia, Washington.

11-88. A copy of a memorandum dated June 2, 1931 from the Commissioner of Indian Affairs to Mr. Ely of the Office of the Secretary of the Interior, setting forth a resume of the situation on Ahtanum Creek as it pertains in particular to the agreement of May 9, 1908.

11-89. A letter dated June 8, 1931 from the Acting Secretary of the Interior to the Attorney General

transmitting a copy of a letter dated May 19, 1931, from the Director of the Department of Conservation, State of Washington, to Secretary Wilbur; a copy of a telegram of May 21, 1931, from Lynch to Senator Jones; a copy of a letter dated September 9, 1929, from W. H. Code to R. K. Tiffany, Supervisor of Hydraulics, Olympia, Washington, respecting the agreement of May 9, 1908; a copy of memorandum dated June 2, 1931, to Mr. Ely from Commissioner of Indian Affairs.

11-90. A letter dated June 13, 1931 from Senator C. C. Dill to the Commissioner of Indian Affairs, forwarding to him a copy of a letter dated May 27, 1931 from the President of the Ahtanum Irrigation District. Senator Dill states that he hopes a compromise may be reached rendering unnecessary the institution of litigation.

11-91. A letter dated June 23, 1931 from the Superintendent of the Yakima Indian Agency to Commissioner of Indian Affairs, transmitting a petition by the Yakima Indians owning farm land on the Ahtanum Irrigation Project, requesting that they be given fair treatment and that their rights be protected.

11-92. A clipping from the Yakima Morning Herald dated Saturday, November 21, 1931, stating that the white water users from Ahtanum Creek have presented their problem to Senator Jones and are requesting his assistance.

11-93. A letter dated November 25, 1931, from W. M. Reed, Special Irrigation Engineer, to Director of Irrigation, Bureau of Indian Affairs, advising him of having contacted the United States Attorney for the purpose of acquainting him with all the facts involving the Ahtanum Creek dispute. Likewise reported in that letter were the efforts towards seeking

a compromise between the Indian and white water users over the stream in question.

11-94. A letter dated November 30, 1931, from W. M. Reed, Special Irrigation Engineer, to the Director of Irrigation, Bureau of Indian Affairs, reporting on efforts to effectuate a compromise for 1932 in the dispute over rights to the use of water from Ahtanum Creek. In that letter he recommends that no suit be instituted until every effort to settle the dispute by compromise has been exhausted.

11-95. A letter dated December 3, 1931, from Roy C. Fox, United States Attorney to the Attorney General. Accompanying that letter was a typewritten copy of a letter dated November 30, 1931, from G. E. Clark, District Counsel, U. S. Indian Field Service, to John H. Lynch, Secretary of Ahtanum Irrigation District; a copy of a letter dated December 1, 1931, from John H. Lynch, Secretary and Attorney for Ahtanum Irrigation District to G. E. Clark; a copy of a letter dated December 1, 1931, from G. E. Clark, to Roy C. Fox, United States Attorney; all of which pertain to a proposed settlement respecting rights to the use of water from Ahtanum Creek during the irrigation season of 1932.

11-96. A letter dated January 18, 1932, from the Attorney General to the Secretary of the Interior advising that in view of the agreement for the irrigation season 1932 which had been reached in regard to water from Ahtanum Creek the United States Attorney had recommended no action be taken for the institution of the suit to adjudicate the rights to the use of water which were involved.

11-97. A letter dated February 13, 1932, from Senator C. C. Dill to the Commissioner of the Bureau of Indian Affairs, transmitting to him copy of a letter dated February 8, 1932, from John H. Lynch, Secre-

tary of Ahtanum Irrigation District, to Senator Dill. In Mr. Lynch's letter reference is made to the desirability of referring the dispute over the rights to the use of water of Ahtanum Creek to Congress for settlement.

11-98. A printed copy of S. 3998, 72nd Congress, 1st Session, being a bill "Approving and confirming contract for apportionment of waters of Ahtanum Creek, Washington, between Yakima Indian Reservation and lands north thereof, dated May 9, 1908."

11-99. A letter dated March 4, 1932, from the Secretary of the Ahtanum Indian Water Users Association to the Commissioner of Indian Affairs, transmitting a copy of a newspaper report in regard to the dispute over the rights to the use of water from Ahtanum Creek, and in which it is stated that Senator Jones will be asked to seek ratification by Congress of the agreement of 1908.

11-100. Copy of a letter dated March 22, 1932, from the Secretary of the Interior reporting on H. R. 10351 a bill approving and confirming the contract of May 9, 1908, in which letter the Secretary of the Interior stated he had no objection to ratification by Congress of the agreement in question. Withdrawn.

11-101. A copy of a memorandum dated March 22, 1932 from the Commissioner of Indian Affairs to the Secretary of the Interior, requesting that the Department of the Interior report unfavorably to H. R. 10351, 72nd Congress, 1st Session.

11-102. A copy of a letter dated March 23, 1932, from the Secretary of the Interior to the Chairman of the Committee on Indian Affairs, United States Senate, regarding S. 3998, companion bill of H. R. 10351, both of which were introduced for the purpose of having Congress approve and confirm the agreement of May 9, 1908. In that letter, as in the

correspondence regarding the legislation in the House, the Secretary of the Interior stated that he would have no objection to the ratification by Congress of the agreement. Withdrawn.

11-103. Letter dated March 30, 1932, from John H. Lynch, Secretary of Ahtanum Irrigation District, to the Commissioner of Indian Affairs, transmitting to him copies of two resolutions adopted by the Ahtanum Irrigation District on February 29, 1932, one requesting that the State Supervisor of Hydraulics be requested to divide Ahtanum Creek strictly in accordance with the agreement of May 9, 1908; the other recommending Congressional relief without regard to the attitude of the Office of Indian Affairs or the Secretary of the Interior.

11-104. A telegram dated April 19, 1932, from the President of the Yakima Indian Water Users Association to the Secretary of the Interior charging that the agreement of May 9, 1908, was based on political expediency without consideration of justice for the Indians and stating that if the proposed bill were ratified that the Indians would seek reimbursement from the United States.

11-105. A memorandum designated "Memorandum on Reasons Why the Bill to Ratify the 1908 Agreement of the Ahtanum Creek Should be Defeated," signed by Nealy N. Olney for Ahtanum Creek Indian Water Users Association, and setting forth the position of the Indians in regard to the illegality of the agreement of May 9, 1908.

11-106. A letter dated May 31, 1932, for the Attorney General from the Ahtanum Indian Water Users Association, pointing out that the temporary agreement for the year 1932 had been repudiated by the white water users and requesting that the United States Attorney be instructed to proceed promptly

to institute litigation to settle the conflict over rights to the use of water from Ahtanum Creek.

11-107. A letter dated January 11, 1933, from the Secretary of the Ahtanum Indian Water Association requesting the aid of the Secretary of the Interior in securing a more equitable apportionment for the Indians of the water from Ahtanum Creek.

11-108. A letter dated July 31, 1933, from the Secretary of the Indian Irrigation Association, (Ahtanum) to the Commissioner of Indian Affairs, referring to the blocking of the ratification of the agreement of 1908, and requesting that the Commissioner of Indian Affairs take steps to secure a more satisfactory settlement for the Indians as to water from Ahtanum Creek.

11-109. A letter dated October 2, 1933, from Harold L. Ickes, Secretary of Interior, to the Attorney General, requesting that appropriate instructions be given to the United States Attorney to proceed with a suit to settle the conflict over rights to the use of water from Ahtanum Creek.

11-110. A letter dated January 11, 1934, from Roy C. Fox, United States Attorney to the Attorney General reporting efforts to settle amicably the conflict between the Yakima Indians and the white water users over rights to the use of water from Ahtanum Creek.

11-111. A letter dated January 18, 1934, from Senator C. C. Dill to the Commissioner of Indian Affairs, stating that he hoped it would be possible to call off the proposed suit to adjudicate rights to the use of water and transmitting a copy of a letter dated January 13, 1934 from John Lynch, Secretary of the Ahtanum Irrigation District to Senator Dill and a copy of a letter dated January 11, 1934 from United States Attorney Fox to Mr. Lynch.

11-112. A letter dated September 29, 1936 from J. M. Simpson, United States Attorney to the Attorney General, transmitting a copy of a letter dated October 1, 1936, to Mr. Simpson, from John H. Lynch, Secretary of the Ahtanum Irrigation District. In that letter Mr. Lynch outlined in detail the history of the conflict between the Yakima Indians and the white water users over rights to the use of water from Ahtanum Creek.

11-113. A letter dated October 1, 1936 [see No. 112 above] from John H. Lynch, Secretary of Ahtanum Irrigation District, to J. M. Simpson, United States Attorney, outlining in detail the history of the conflict between the Yakima Indians and the white water users over rights to the use of water from Ahtanum Creek, together with copies of the exhibits "A" through "M" listed therein.

11-114. A letter dated June 28, 1938, from Sam M. Driver, United States Attorney, to the Attorney General urging the issuance of authority so that the suit to adjudicate rights to the use of water from Ahtanum Creek could be instituted.

11-115. A letter dated August 11, 1938 from Sam M. Driver, United States Attorney to the Attorney General respecting the drafting of a complaint in connection with the conflict between the Yakima Indians and the white water users over the rights to the use of water from Ahtanum Creek.

11-116. A letter dated August 15, 1938, from M. A. Johnson, Superintendent of Yakima Indian Agency to Commissioner of Indian Affairs urging that the suit to adjudicate rights to the use of water of Ahtanum Creek be initiated.

11-117. A letter dated September 24, 1938 from Sam M. Driver, United States Attorney, to the Attorney General submitting proposed complaint to be

filed in the case respecting the conflict over rights to the use of water from Ahtanum Creek.

11-118. A letter dated February 13, 1939, from M. A. Johnson, Superintendent of Yakima Indian Agency to the Commissioner of Indian Affairs, urging the institution of a suit to adjudicate rights to the use of water from Ahtanum Creek.

11-119. A copy of a letter dated May 17, 1939, to Senators Schwellenbach and Bone, Senate Office Building, Olympia, Washington, from John H. Lynch, urging them to take steps to prevent the institution of a suit to adjudicate rights to the use of water from Ahtanum Creek.

11-120. A letter dated May 22, 1939 from Senator Homer T. Bone to the Attorney General, transmitting a copy of a letter dated May 17, 1939 from John H. Lynch, Secretary of the Ahtanum Irrigation District to Senators Schwellenbach and Bone, and a copy of a letter dated January 29, 1908 from the Secretary of the Interior to H. J. Snively respecting the conflict between the Yakima Indians and the white water users over rights to the use of water from Ahtanum Creek.

11-121. A letter dated June 2, 1939 from M. A. Johnson, Superintendent of the Yakima Indian Agency, to the Commissioner of Indian Affairs, transmitting a newspaper clipping from the Yakima Morning Herald of June 2 concerning the proposed suit for the adjudication of the rights to the use of water from Ahtanum Creek, and urging that the suit be instituted in the near future.

11-122. A letter dated June 19, 1939 from Norman M. Littell, Assistant Attorney General, to the Assistant Secretary of the Interior stating that the United States Attorney in Spokane was being authorized to

file a complaint to adjudicate rights to the use of water from Ahtanum Creek.

11-123. A printed copy of S. 2806, 76th Congress, 1st Session, being a bill authorizing the Secretary of the Interior to make a survey of the possible means and feasibility of supplementing the water supply for irrigation of the Ahtanum Creek Valley in the State of Washington.

11-124. A letter dated June 26, 1939 from United States Senator Bone to the Attorney General transmitting original letter dated June 23, 1939 from John H. Lynch, Secretary of the Ahtanum Irrigation District, respecting the conflict between the Yakima Indians and the white water users over the right to the use of water from Ahtanum Creek.

11-125. A letter dated June 29, 1939 from John H. Lynch, Secretary of the Ahtanum Irrigation District to the Assistant Attorney General, transmitting copies of three resolutions adopted by the White water users, the gist of which was that all possible means should be employed to procure the abandonment of a proposed suit to adjudicate rights to the use of water from Ahtanum Creek.

11-126. A letter dated July 1, 1939 from Assistant Attorney General Littell to the Assistant Secretary of the Interior, setting the date for a hearing of the white water users in regard to the institution of a suit to adjudicate the rights to the use of water from Ahtanum Creek.

11-127. A resolution, S. Res. 165, 76th Congress, dated July 18, 1939, requesting the Attorney General to stay proceedings for adjudication of the rights to the use of water available for irrigation of Ahtanum Creek Valley until the Secretary of the Interior has reported on possible means and feasibility of supple-

menting the supply of water for irrigation of the irrigable lands in Ahtanum Valley.

11-128. A letter dated July 18, 1939, from Knute Hill, Congressman from the State of Washington, referring to a conference with representatives of the Department of Justice and members of the Office of Indian Affairs, Judge John H. Lynch, Secretary of the Ahtanum Water Users and himself. Mr. Hill requests the investigation of the Klickitat project and other sources of water to supplement the available supply in the Ahtanum Valley.

11-129. A letter dated July 19, 1939, from John H. Lynch, Secretary of Ahtanum Irrigation District, respecting the bill authorizing a survey of sources of additional water for Ahtanum Valley. Reference is likewise made to the resolution adopted by the Senate, S. Res. 165, requesting the Attorney General to withhold the initiation of action until the investigation has been completed.

11-130. A letter dated July 26, 1939 from John H. Lynch, Secretary of Ahtanum Irrigation District, to Assistant Secretary of the Interior Burlew, enclosing a clipping from the Yakima Herald, of July 26, 1939, reporting on efforts to secure additional water supply in the Ahtanum Valley as a means of settling the dispute between the water users from that source; and a copy of a letter dated July 26, 1939, from Mr. Lynch to the Commissioner of Indian Affairs.

11-131. A letter dated July 26, 1939 to John Collier, Commissioner of Indian Affairs from John H. Lynch, Secretary of Ahtanum Irrigation District, discussing at length the possible solution of the dispute by securing an additional supply of water for Ahtanum Valley from another source, and transmitting a copy of the clipping from the Yakima Herald of July 26, 1939.

11-132. A letter dated August 10, 1939, from John H. Lynch, Secretary of Ahtanum Irrigation District to Secretary of the Interior discussing the possibility of securing a supplemental supply of water for the Yakima Valley, as a means of settling the dispute between white water users and the Indians from Ahtanum Creek.

11-133. A letter dated August 11, 1939, from M. A. Johnson, Superintendent of the Yakima Indian Agency, to Commissioner of Indian Affairs, enclosing a clipping from the Yakima Morning Herald dated August 9, 1939, concerning a proposed survey of the Ahtanum Water situation.

11-134. A letter dated August 25, 1939 from N. W. Irsfeld, Project Engineer, Yakima Indian Reservation, to the Director of Irrigation, U. S. Indian Irrigation Service, reporting in full in regard to the several possible sources of water supply for Ahtanum Valley, and enclosing a copy of a letter dated August 24, 1939 to Mr. Irsfeld from J. S. Moore, Superindendent, Bureau of Reclamation.

11-135. A letter dated September 14, 1939, from John H. Lynch, Secretary of Ahtanum Irrigation District to the Director of Irrigation, U. S. Indian Affairs, in regard to the procurement of a supplemental supply of water to meet the needs of Ahtanum Valley.

11-136. A letter dated September 21, 1939, from N. W. Irsfeld, Project Engineer, Yakima Indian Reservation, to Director of Irrigation, U. S. Indian Irrigation Service, in regard to his earlier report on the possibility of securing a supplemental supply of water.

11-137. A letter dated September 28, 1939, from M. A. Johnson, Superintendent, Yakima Indian Agency, to Commissioner of Indian Affairs, transmitting a copy of the resolution adopted September 27, 1939, by

the Yakima Tribal Council urging immediate institution of a court action, to settle the dispute over rights to the use of water from Ahtanum Creek, and a newspaper clipping.

11-138. A letter dated April 1, 1940 from M. A. Johnson, Superintendent Yakima Indian Agency to Commissioner of Indian Affairs reporting the desire on the part of the Indians to have the suit instituted for the adjudication of rights to the use of water at a very early date and reporting that the Indians contemplate the employment of private attorneys to bring the case in the event that the Attorney General does not start the suit at an early date.

11-139. A copy of Summons and Bill of Complaint filed May 15, 1941, in the District Court of the United States for the Eastern District of Washington, in the case entitled *Frank Totus, et al. v. United States of America*, together with copy of the Order to Dismiss signed by Judge Schwellenbach on December 4, 1941.

11-140. A letter dated June 2, 1942, from M. A. Johnson, Superintendent of Yakima Indian Agency, transmitting a resolution dated May 29, 1942, from the Yakima Tribal Council urging the Secretary of the Interior and the Department of Justice to use every effort to institute a federal action to settle the long-standing dispute between the Indians and white water users from Ahtanum Creek.

11-141. A letter dated July 21, 1942, from Oscar L. Chapman, Assistant Secretary of the Interior, to the Attorney General transmitting a copy of a letter of June 29, 1942, from the Secretary of the Interior to the Vice President of the United States reporting adversely on the proposed project which was investigated, pursuant to Senate Resolution 165, 76th Congress, agreed to July 18, 1939. In that letter the Assistant Secretary of the Interior urged the institu-

tion of the suit to adjudicate rights to the use of water from Ahtanum Creek.

11-142. A letter dated August 17, 1942, from Homer T. Bone, United States Senator, to Secretary of the Interior transmitting a copy of a letter of August 10, 1942, to Senator Bone, from John H. Lynch, Secretary of the Ahtanum Irrigation District. In that letter, Mr. Lynch comments upon the report of the Secretary of the Interior to the Vice President in regard to the lack of feasibility of the Klickitat project.

11-143. A resolution dated October 16, 1942, from the Yakima Tribal Council to the Attorney General requesting the institution of a suit to settle the conflict between the Yakima Indians and the white water users over the rights to the use of water from Ahtanum Creek.

11-144. A letter dated November 9, 1942, from Oscar L. Chapman, Assistant Secretary of the Interior, to the Attorney General commenting on the proposed complaint and requesting that the institution of the adjudication suit to settle the conflict between the Yakima Indians and the white water users over rights to the use of water from Ahtanum Creek be withheld in accordance with Senate Resolution 165—76th Congress; and enclosing a copy of a letter dated October 7, 1942, from N. W. Irsfeld, Senior Engineer, to Acting Director of Irrigation, United States Indian Service.

11-145. A petition of the Yakima Tribe of Indians dated May 8, 1944, to the Secretary of the Interior requesting the Secretary, among other things, to declare null and void the agreement of May 9, 1908, and a statement in support of the petition.

11-146. A resolution dated July 9, 1945, by the Yakima Tribal Council announcing that the finding of additional supply of water from the Klickitat River

would not in any way settle the controversy arising over the unsettled condition of water rights to the Ahtanum Creek and requesting immediate action be taken in regard to the matter.

Plaintiff's Exhibit 12

Reserved.

Plaintiff's Exhibits 13 Through 138

Reserved.

DEFENDANT'S EXHIBITS

Defendant's Exhibit 139

Decree of Superior Court of the State of Washington in and for the County of Yakima, No. 18279, *In the Matter of Determination of Water, The State of Washington v. Annie Wiley Achepohl.*

Defendant's Exhibit 140

Copy of the patent to the Bishop of Espanolo, now the Bishop of Seattle.

Defendant's Exhibit 141

Title Certificate showing description of patents.

Defendant's Exhibit 142

Patent to Stewart.

Defendant's Exhibit 142-A

Patent to Southern.

Defendant's Exhibit 143

Statement of Lands mortgaged by Federal Land Bank.

IN THE
**United States Court
of Appeals**
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant

v.

AHTANUM IRRIGATION DISTRICT, a
corporation, et al.,

Appellees.

No. 14714

APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE EASTERN DISTRICT
OF WASHINGTON, SOUTHERN DIVISION

BRIEF OF APPELLEES

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant

vs.

AHTANUM IRRIGATION DISTRICT,
a corporation, et al.,

Appellees.

No. 14714

APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE EASTERN DISTRICT
OF WASHINGTON, SOUTHERN DIVISION

BRIEF FOR THE AHTANUM IRRIGATION
DISTRICT, A CORPORATION, ET AL., AP-
PELLEES, AND FOR THE FEDERAL LAND
BANK OF SPOKANE, A CORPORATION,
APPELLEE

OPINION BELOW

The opinion of the trial court was entered March 7, 1953. It was amended and supplemented January 18, 1954.¹ By stipulation the opinion was omitted from the record. It is reprinted and submitted as Appendix A to brief of Intervenor the State of Washington for the convenience of Court and counsel. The references to the opinion throughout this brief are to the pages in the reported opinion appearing in 124 F. Supp. 818.

¹ United States vs. Ahtanum Irrigation District, et al., 124 F. Supp. 818 (U.S.D.C.E.D. Wash. S.D. 1954)

JURISDICTION

The jurisdiction of the United States District Court was invoked by the United States of America pursuant to the act which provides that: " * * * the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States. * * * "2 Jurisdiction to review the judgment below has been conferred upon this court by Congress.³

THE TREATY, CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Treaty of June 9, 1855 between the United States of America and the Yakima Tribe of Indians is involved in this case.⁴

The constitutional provision dealing with the Indian Tribe⁵ and the extent of authority conferred by the Acts of Congress,⁶ the Enabling Act for the State of Washington and the Constitution of the State of Washington are before the Court for interpretation.⁷

The Acts of 1866 and 1870⁸ and the Desert Land Act of 1877⁹ are likewise involved. They provide for the

² 28 U.S.C.A. 1345.

³ 28 U.S.C.A. 1291.

⁴ 12 Stat. 951, 11 Kapler 698; R. 16, and Plaintiff's Ex. 1.

⁵ U. S. Constitution, Article 1, Section 8, Clause 3.

⁶ 25 U.S.C. 2, 381 and 382.

⁷ Enabling Act, Section 4, 25 Stat. 676. Constitution of the State of Washington, Article 21, Section 1.

⁸ 43 U.S.C. 661.

⁹ 43 U.S.C. 321.

appropriation of the right to use of water on public lands.

Likewise involved are the original Act authorizing the appropriation of water in Yakima County,¹⁰ the statutes of the State of Washington authorizing appropriation of the right to the use of water,¹¹ the State Water Code, and the Federal Reclamation Act of 1902.¹²

COUNTERSTATEMENT OF THE CASE

(a) THE TREATY OF 1855

By a Treaty dated June 9, 1855, between the United States of America and the Yakima Indians, an area now comprising a large portion of the State of Washington was ceded to the United States. The balance of the lands comprising over a million acres and containing valuable timber, fishing and hunting grounds, was retained by the Yakima Indians.¹³

The northern boundary of the reserved area now comprising the Yakima Indian Reservation is described in part as:

“Commencing on the Yakima River, at the mouth of Attahnam River; thence westerly along said Attahnam River to the forks; thence along the southern tributary * * * ”¹⁴

The Treaty makes no mention of the right to the

¹⁰ Washington Session Laws 1873, page 520.

¹¹ Chapter 117 Session Laws of 1917, also found in R.C.W. 90.04.020.

¹² U. S. Reclamation Act 1902, 32 Stat. 388.

¹³ Pre Trial Order, R. 123, Plaintiff's Ex. 1, 9 and 10.

¹⁴ R. 18.

use of water for irrigation. There is reserved the right to hunt and fish.¹⁵ Other waters entirely on the reservation were ample to furnish all of the irrigation needed for the farm lands on the Ahtanum Creek in the reservation.¹⁶

The Yakima River borders the Yakima Indian Reservation and substantial quantities of water are taken from the Yakima River for the Wapato Project.¹⁷

(b) AHTANUM CREEK

Ahtanum Creek is a non navigable stream flowing east and slightly north from the Cascade Mountains, all in Yakima County. There are two forks, the south fork is the north boundary of the Yakima Indian Reservation and is the smaller of the two. The north fork, containing approximately three-fourths of the flow of the stream, originates entirely off the Yakima Indian Reservation and joins the south fork to form the main channel.¹⁸

Ahtanum Creek flows on the south side of the valley floor where there is a well defined channel. The stream forms several branches and several islands on the north side below the narrows.¹⁸

In about 1847 the Catholic Mission located on the north side of Ahtanum Creek utilized water from the creek for irrigation.¹⁹

¹⁵ R. 20.

¹⁶ R. 129, R. 449-452.

¹⁷ 38 Stat. 604.

¹⁸ Pltf. Ex. 5 F 1.

¹⁹ Pltf. Ex. 12.

The property on the north side was developed by white settlers and was patented in fee by the United States of America. There was no reservation of water rights in the patents except riparian rights and such rights as had been acquired under the Desert Land Act.²⁰

The lands on the south side of Ahtanum Creek were allotted to the Indians and certain trust patents and fee patents were issued.²¹

925.45 acres of irrigated land on the Indian side were patented in fee more than ten years before this case was started.²²

There is not sufficient water in Ahtanum Creek to irrigate the land on both sides of the creek now partially irrigated.²³

(c) MUNN vs. REDMAN AND THE GOVERNMENT'S PROPOSED BILL IN EQUITY

In 1906 there was a shortage of water in Ahtanum Creek. An injunction action was commenced against Mr. Redman, the then Indian Service Engineer. About 1902 the Indian Irrigation Service had commenced the enlargement of the existing diversion ditches on the Reservation Side of Ahtanum Creek and continued this construction until the shortage of 1906.²⁴ While the action

²⁰ Defendant's Exhibit 141, 142, 142 A.

²¹ Pltf. Ex. 4B and D, R. 129.

²² R. 129.

²³ R. 129.

²⁴ R. 415.

was for injunction brought by H. J. Snively, Attorney of Yakima representing the plaintiff, David Munn, the action was primarily for the purpose of settling the division of the water of Ahtanum Creek.²⁵

Mr. A. G. Avery, United States Attorney at Spokane, Washington, appeared as attorney for the defendant, Redman, the Indian Service Engineer. This appearance was at the instance of the Attorney General.²⁶ On May 11, 1907, Mr. Avery wrote Mr. Snively pointing out that the court action would not solve the water problems on Ahtanum Creek because of the nature of the rights involved and suggested a Federal Court proceeding.²⁷ On May 18, 1907, Mr. Snively, attorney for the plaintiff, wrote Avery that he would dismiss the case of *Munn vs. Redman* provided Avery would immediately file a bill in equity on behalf of the United States so that all questions of the right to the waters of Ahtanum Creek could be determined.²⁸ On May 21, 1907, Mr. Avery replied that he could not get approval from the Attorney General's Office as fast as requested and that inasmuch as questions of law only would be involved, it could be taken up later.²⁹ On July 30, 1907, the Attorney General wrote to Mr. Avery and returned the signed bill in equity as prepared

²⁵ Pltf. Ex. 8.

²⁶ Pltf. Ex. 11-2, 11-3, 11-5. (Pertinent excerpts of exhibits are arranged in chronological order and printed as Appendix "B" to this brief.)

²⁷ Plaintiff's Exhibit 11-113 "I"; Appendix P. 7.

²⁸ Plaintiff's Exhibit 11-113 "J"; Appendix P. 8-9.

²⁹ Plaintiff's Exhibit 11-113 "K"; Appendix P. 11.

and directed him to proceed to determine the names of the proposed defendants and stated that the object of the action was "the settlement of the use of the water of Attah-num Creek, Washington."³⁰

The Department of Justice wired the United States Attorney at Spokane on August 12, 1907 to withhold the filing of the Government's Bill in equity.³¹ At this time the Winters case had been decided in the United States Court of Appeals for the Ninth Circuit.³² Likewise the Winters case was on appeal to the Supreme Court of the United States, and the Attorney General's office who directed that the District Attorney hold up the filing of the bill in equity represented the United States on the appeal in the Winters case. It was argued in the fall of 1907, and decided by the Supreme Court of the United States on January 6, 1908.

The Attorney General's action in withholding the filing of the proposed bill in equity to settle the rights of the water users in Ahtanum Creek is explained by the concurrent activities by the then Secretary of the Interior, James Rudolph Garfield. He appeared personally in Yakima County.³³ He conferred with officials of the Indian Service and the United States Attorney's Office and met with owners of land on the north side of Ahtanum

³⁰ Plaintiff's Exhibit 11-14; Appendix P. 12.

³¹ Plaintiff's Exhibit 11-17; Appendix P. 13.

³² *Winters vs. United States*, C.C.A. 9 (1906), 143 F. 740; *Winters vs. United States*, C.C.A. 9 (1906) 148 F. 684.

³³ R. 547, 548.

Creek. The Secretary of the Interior expressed the desire that the situation called for a settlement by agreement rather than by litigation.³⁴ He further promised to send the Chief Engineer of the Indian Irrigation Service, Mr. W. H. Code, to make a field investigation and report his findings.

The case of *Munn vs. Redman* was filed as the initial step in the contemplated settlement of the controversy, the Government was invited to file a bill in equity to settle all matters and it declined to do so. The matter then proceeded to settlement, both parties being presumed to have in mind the decision in the case of *Winters vs. United States*.³⁵

(d) AGREEMENT OF MAY 9, 1908

From the above correspondence between Mr. Snively, who in fact was representing all of the non-reservation owners north of the Creek, and the United States Attorney, it is obvious that Mr. Snively was demanding that the water rights problem on Ahtanum Creek be settled by litigation either in the case initiated by him in behalf of Mr. Munn or by an action commenced by the Government in Federal Court. The withholding of the proposed litigation was a deliberate course of conduct chosen by the United States Attorney General which finally cul-

³⁴ Plaintiff's Exhibit 11-6.

³⁵ *Winters vs. United States* (Jan. 6, 1908) 207 U. S. 564.

minated in the Agreement of 1908 negotiated in the utmost of good faith by all parties concerned.³⁶

The agreement, including the names of all participating parties that acted through their attorneys in fact appears as Plaintiff's Exhibit 11-27.³⁷

Subsequent to the visit of Secretary Garfield³⁸ and pursuant to the direction of the Secretary, Chief Engineer Code of the Indian Service visited the Yakima Reservation in August of 1907 and caused to be made certain field surveys which he later included in a comprehensive report to Secretary Garfield.³⁹ Thereafter meetings were held with the non-reservation owners, with Mr. Avery, the United States attorney, participating in all of the meetings representing the United States. It became apparent that it was impossible for the negotiators to make any progress in view of the fact that the non-reservation owners were not organized and that each owner had to be dealt with separately.⁴⁰

During this period the report by Chief Engineer Code had been forwarded to the Commissioner of Indian Affairs by Secretary Garfield and was approved by the Com-

³⁶ Plaintiff's Exhibit 11-17; Appendix P. 13.

³⁷ The Agreement omitting the names of the parties acting through their attorneys in fact is found in the Appendix A, page 1 et. seq., and in R. 26.

³⁸ The then Secretary of Interior, referred to in Appellant's brief as a subordinate official, was the son of former President James A. Garfield.

³⁹ Plaintiff's Exhibit 11-6; Appendix P. 14.

⁴⁰ R. 548 and 549.

missioner of Indian Affairs.⁴¹ It was determined that the only way negotiations could proceed in an orderly manner was by the organization of a committee composed of non-reservation owners who would have the power to act for all of the other people on the north side of the Creek. Powers of attorney were then prepared by Mr. Snively and Mr. Avery and considerable time was consumed in securing all of the necessary signatures to these powers of attorney.⁴² The powers of attorney were further specifically required by Secretary Garfield and he put a time limit for the consummation of this phase of the negotiations of March 15, 1908 in a letter to Mr. Snively.⁴³

Again, it is interesting to note that at this time the Winters case⁴⁴ had been decided by the United States Supreme Court and the negotiating Government officials were undoubtedly aware of this case and other cases dealing with Indian water rights.⁴⁵

The powers of attorney were eventually secured satisfactory in form to Mr. Avery and Mr. Snively⁴⁶ and the Commissioner of Indian Affairs was so notified by letter of April 9, 1908 from the Yakima Indian Reserva-

⁴¹ Plaintiff's Exhibit 11-6; Appendix P. 18, and Plaintiff's Exhibit 11-18; Appendix P. 19.

⁴² R. 551.

⁴³ Plaintiff's Exhibit 11-113 "L"; Appendix P. 23.

⁴⁴ Winters vs. U. S., 207 U. S. 564.

⁴⁵ Plaintiff's Exhibit 11-6; Appendix P. 14. Conrad Investment Company vs. United States, 161 Fed. 829.

⁴⁶ R. 551.

tion Superintendent. Request was further made at this time that Mr. Code be directed to come out and proceed with the negotiations.⁴⁷ Chief Engineer Code was so directed upon April 13, 1908 by Secretary Garfield and he was given specific orders which in substance required him to secure an agreement, if possible, for a division of the low water flow of the Creek based upon one-third to the Reservation side and two-thirds to the non-reservation side, but if that basis could not be secured, then the agreement should be based upon the present irrigated acreage on both sides of the creek.⁴⁸ Chief Engineer Code's report of October 17, 1907 to the Secretary had indicated that the irrigated acreage of Indian lands south of the Creek was 1500 acres and that the non-reservation irrigated acreage north of the creek was 5500 acres.⁴⁹

The agreement was negotiated after first being transmitted by Chief Engineer Code to Secretary Garfield and the form of the agreement received the specific approval of both Secretary Garfield and the Commissioner of Indian Affairs as finally consummated.⁵⁰ It was signed by Chief Engineer Code on behalf of the United States and by the Water Users' Committee on May 9, 1908,⁵¹ and was later on June 30, 1908 approved by Frank Pierce, First Assistant Secretary of Interior. After being again spe-

⁴⁷ Plaintiff's Exhibit 11-21; Appendix P. 25.

⁴⁸ Plaintiff's Exhibit 11-23; Appendix P. 27.

⁴⁹ Plaintiff's Exhibit 11-6; Appendix P. 14.

⁵⁰ Plaintiff's Exhibits 11-25 and 11-26; Appendix P. 30-31.

⁵¹ R. 555.

cifically approved by the Office of Indian Affairs⁵² the agreement was on June 27, 1908, referred to the Secretary of Interior for his approval, and as above mentioned, resulted in the approval of the Agreement by the First Assistant Secretary. We cannot see how the plaintiff in the face of the above facts can make its contention that the agreement of 1908 was illegal and entered into by unauthorized subordinate officials of the Department of Interior.⁵³ Secretary of Interior Garfield and the Office of the Commissioner of Indian Affairs were at all times cognizant of every step taken in securing the agreement and approved each step.

(e) STATE ADJUDICATION

With the knowledge and consent of the Department of Interior the State of Washington in 1925 commenced a proceeding in Yakima County for the adjudication of the water rights of the owners on the north side of Ah-tanum Creek. It was a proceeding in equity brought under the State Water Code.⁵⁴ The rights of 216 claimants and landowners were involved and a hearing was held by the lower court with the State Supervisor of Hydraulics acting as a Referee. The landowners were classified into thirty groups according to the dates of initiation of their respective water rights. The trial court after

⁵² Plaintiff's Exhibit 11-28; Appendix P. 32.

⁵³ Plaintiff's Brief, page 21.

⁵⁴ Chapter 117, Session Laws of Washington of 1917, page 447.

considering the findings and recommendations of the Supervisor acting as referee, heard exceptions thereon and divided the water users into 31 classifications or groups. Some of these water users feeling aggrieved, appealed the case and the Supreme Court of the State of Washington affirmed the trial court in its complete adjudication of 75% of the waters of Ahtanum Creek pursuant to the 1908 Agreement.⁵⁵ The users of the water on the north side have acted under this decree ever since and are now dividing 75% of the waters on the north side in accordance therewith.⁵⁶

Notwithstanding the 1908 Agreement and the State adjudication above referred to, the appellant commenced this action on July 2, 1947, seeking the entire flow of Ahtanum Creek on behalf of the Yakima Tribe of Indians. In appellant's complaint⁵⁷ it seeks specifically 75 cubic feet per second during the month of June each year, 66 cubic feet per second during the month of July each year, and 38 cubic feet per second during the month of August each year from the waters of Ahtanum Creek. From the official records of the United States Geological Survey it appears that the minimum flow of Ahtanum Creek during 1947 for the month of June was 62 cfs., for the month of July was 35 cfs., for August was 24 cfs. In 1945 the minimum flow in June was 53 cfs., in July was

⁵⁵ In re Ahtanum Creek, 139 Wash. 84; 245 Pac. 758.

⁵⁶ R. 515.

⁵⁷ R. 8, 9 and 10.

23 cfs., in August was 17 cfs. In 1944 the minimum flow in June was 32 cfs., in July 18 cfs., in August 13 cfs. In 1941 the minimum flow for June was 43 cfs., for July was 20 cfs., for August was 18 cfs. In 1940 the minimum flow for June was 47 cfs., for July was 26 cfs., for August was 18 cfs. In 1939 the minimum flow for June was 47 cfs., for July 19 cfs., for August 16 cfs.⁵⁸

It is only in exceptional water years that there is sufficient water during the low flow in Ahtanum Creek to equal the quantity asked by the appellant. Of course, this would assume the diversion of no waters upon the 10,000 acres lying north of the creek and belonging to the appellees.

STATEMENT OF THE ISSUES

Is the agreement of 1908 dividing the waters of Ahtanum Creek a binding agreement on the United States, representing the Yakima Indian tribe, and the water users on the north side of the Creek?

Does the adjudication of 75% of the waters of Ahtanum Creek by the State of Washington under the State Water Code bind the appellant and its ward and are they barred by laches and estoppel from contesting the original contract of 1908 and the State adjudication?

⁵⁸ Plaintiff's Exhibit 4 E, Pre-trial order Exhibit B, Appendix B of Appellant's brief, Page 75 and 77. Note: That the minimum flow of the north fork of Ahtanum Creek and the south fork of Ahtanum Creek have to be added to get the total flow.

Was the dismissal of the plaintiff's claim a correct disposition of the action?

Is the appellant entitled to an injunction against anyone using any portion of the flow of Ahtanum Creek and can the appellant as trustee for the Yakima Indian nation now claim the entire flow under the Treaty of 1855?

SUMMARY OF THE ARGUMENT

The contract of 1908 is a valid and binding agreement limiting the reservation lands to 25% of the normal flow of Ahtanum Creek and by administrative interpretation has been so recognized. Likewise the appellant is estopped from questioning the validity of the contract by reason of long acquiescence, estoppel and laches.

The State of Washington under the State Water Code commenced adjudication of the rights of the respective landowners in and to 75% of the flow of Ahtanum Creek and the adjudication was commenced with the knowledge and consent of the appellant and its agents, which constitutes an adjudication vesting in those persons participating in such adjudication a good title to the waters so adjudicated.

The appellant has sought to invalidate the agreement of 1908 and to set aside and nullify the State adjudication. The trial court's denial of such right constituted authority for entering a dismissal of plaintiff's claim.

The Treaty of 1855 reserved no waters for irriga-

tion, but, if any such reservation is held to exist, then the agreement of 1908 provided waters for the Indians under the Winters case and the decisions following it.

ARGUMENT

(a) VALIDITY OF 1908 AGREEMENT

It is contended by the appellant that the agreement is invalid and of no force and effect. We pass for the moment the ethics involved in the Government's position as well as its standing in equity by the assertion that its own agreement negotiated at the time with the utmost of good faith is now invalid. Appellees vigorously assert that the agreement is in all respects valid and that the Secretary of Interior acting by and through his Agent, Chief Engineer Code, did have the power and authority to enter into a binding agreement limiting the water for both the Reservation and non-reservation people.

It is provided under Duties of the Commissioner of Indian Affairs as follows:

"Section 2. Duties of Commissioner. The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian Affairs and of all matters arising out of Indian relations."⁵⁹

It is further provided with reference to irrigation of Indian lands as follows:

"Section 381. Irrigation lands; Regulation of use of

⁵⁹ 25 U.S.C.A., Sec. 2, page 4; R. S. Sec. 463.

Water. In cases where the use of water for irrigation is necessary to render the lands within any Indian Reservation available for agricultural purposes, the Secretary of the Interior is authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor.⁶⁰

It is further provided concerning irrigation projects under the Reclamation Act that:

"Sec. 382. Irrigation projects under Reclamation Act. In carrying out any irrigation project which may be undertaken under the provisions of sections 372, 373, 381, 383, 391, 392, 411, 416, 419, 421, 431, 432, 434, 439, 461, 476, 491 and 498 of Title 43, Public Lands, and which may make possible, and provide for in connection with the reclamation of other lands, the irrigation of all or any part of the irrigable lands heretofore included in allotments made to Indians under section 334 of this title, the Secretary of the Interior is authorized to make such arrangement and agreement in reference thereto as said Secretary deems for the best interest of the Indians; Provided, that no lien or charge for construction, operation, or maintenance shall thereby be created against any such lands."⁶¹

In interpreting these statutes it has been held that the Commissioner of Indian Affairs has very broad powers in the management of all Indian Affairs.⁶²

For the Departments of Government to act necessarily

⁶⁰ 25 U.S.C.A., Sec. 381; page 321; 24 Stats. 392.

⁶⁰ 25 U.S.C.A. Sec. 381; page 321; 24 Stats. 390.

⁶¹ 25 U.S.C.A. Sec. 382; page 322; 35 Stats. 798.

the powers of discretion must be exercised and it is not necessary that the head of a Department must show statutory provision for everything he does.⁶³

In interpreting Section 381, it has been held that the Secretary of the Interior had the power to prescribe rules and regulations with reference to water as between a patentee of an original Indian allotment and other lands in the Indian Reservation not patented. In this case the

in it was stated: "In our opinion the very general language of the statutes makes it quite plain the the authority conferred upon the Commissioner of Indian Affairs was intended to be sufficiently comprehensive to enable him, agreeably to the laws of Congress and to the supervision of the President and the Secretary of the Interior, to manage all Indian affairs, and all matters arising out of Indian relations, with a just regard, not merely to the rights and welfare of the public, but also to the rights and welfare of the Indians, and to the duty of care and protection owing to them by reason of their state of dependency and tutelage."

⁶³ United States vs. McDaniel, 7 Pet. 1; 8 Law Ed. 587, wherein it is stated: "A practical knowledge of the action of any one of the great departments of the government must convince every person that the head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law; but it does not follow that he must show statutory provision for everything he does. No government could be administered on such principles. To attempt to regulate by law the minute movements of every part of the complicated machinery of government would evince a most unpardonable ignorance on the subject. Whilst the great outlines of its movements may be marked out, and limitations imposed on the exercise of its powers there are numberless things which must be done, that can neither be anticipated nor defined, and which are essential to the proper action of the government."

treaty in question was essentially the same as the one now before the court.⁶⁴

In a Ninth Circuit Court case involving the Flathead Indian Reservation in Montana, this court refused to grant an injunction wherein it was alleged that excessive waters were being diverted by the defendants therein over the amounts allocated to them and their predecessors by the Secretary of Interior in 1921. The Treaty in question was similar to the one involved in the case at bar. The Government contended that all irrigable lands on the Flathead Indian Reservation whether allotted or surplus, had equal water rights and that all diversions whether from government or private ditches, were to be administered by the Project Engineer. This court held that because no showing could be made of a violation of a rule or regulation promulgated by the Secretary of Interior, the injunction would not lie.⁶⁵

⁶⁴ United States vs. Powers, 305 U. S. 527; 83 Law Ed. 330, wherein it was stated: "The Secretary of the Interior had authority (Act 1887) to prescribe rules and regulations deemed necessary to secure just and equal distribution of waters. It does not appear that he ever undertook so to do."

⁶⁵ United States vs. Alexander, 131 Fed. (2d) 359; C.C.A. 9-1942, wherein it is stated: "Assuming, without expressing an opinion thereon, that the water rights of appellees and those of the unallotted lands were of equal priority, as stated in United States vs. McIntire, 9 Cir., supra, the general allotment act (25 U.S.C.A. Sec. 381) requiring 'just and equal distribution' would be applicable here because of the insufficiency of the water supply. That statute provides for promulgation of such rules and regulations as the Secretary of the Interior might deem necessary to secure the just and equal distribution of water. No such rules and regulations have been promulgated herein pursuant to that statute. The so-called 'secretarial de-

Clearly, under the applicable statutes and the cases thereunder, Secretary Garfield had ample authority to enter into the limiting agreement of 1908 and the same is valid. Actually the agreement was more favorable to the reservation than a straight adherence to the irrigated acreage on both sides of the creek would admit. If the acreage basis had been strictly followed, a division of about 80/20 would have been called for instead of 75/25 as finally negotiated.⁶⁶

(b) ADMINISTRATIVE INTERPRETATION AND
EVENTS SUBSEQUENT TO THE AGREE-
MENT OF MAY 9, 1908.

Notwithstanding the fact that the Indian Service under the 1908 Agreement had water for at most only about 1500 to 2000 acres⁶⁷ and had no definite plan at that time as to how they were to get more water, the Indian Irrigation Service nevertheless commenced construction of the Ahtanum Indian Irrigation Project on August 6, 1908.⁶⁸ As can be seen, the ink was hardly dry on this solemn water compact entered into by the parties on both sides in the utmost of good faith to settle for all time this difficult water rights matter, when the

crees' related to alleged 'private' rights and were not of the character required. There not being a rule or regulation, of course a violation thereof could not be shown."

⁶⁶ Plaintiff's Exhibit 11-6, Appendix P. 14; R. 430-431.

⁶⁷ Plaintiff's Exhibit 13-A, Letter of May 6, 1929 from John H. Lynch to Dr. Ray Lyman Wilbur, Secretary of the Interior, Appendix P. 45, R. 557.

⁶⁸ Appellant's Brief, page 5.

Indian Service set about creating conditions that bred dissatisfaction in white patentees, white tenant farmers and the few Indians actually engaged in farming on the Reservation side of Ahtanum Creek and ultimately led to this litigation.⁶⁹

The present Ahtanum Indian Irrigation Project completed in 1915 brought a total of better than 4900 acres of Reservation land under their newly constructed canal system,⁷⁰ when, as stated above, they had assured water for only 1500 to 2000 acres of land during the entire irrigation season. A more irresponsible course of conduct by the Government officials involved can scarcely be imagined. This course of action by the Indian Irrigation Service was most misleading and was a breach of faith upon its part towards the members of the Yakima Tribe of Indians involved, who, witnessing the construction of the system, undoubtedly thought that water would be forthcoming. Further, this enlargement of the Ahtanum Indian Irrigation Project was the primary cause of the pressure that later developed to repudiate the 1908 agreement.

In 1905 Secretary of Interior Hitchcock limited the rights of the Yakima Tribe of Indians in the low water flow of the Yakima River to 147 cubic feet per second.

⁶⁹ Plaintiff's Exhibit 11-47, Letter of July 19, 1927 from R. K. Tiffany, State of Washington Supervisor of Hydraulics to Hubert Work, Secretary of the Interior; Appendix P. 40.

⁷⁰ R. 124 and 128.

This was a part of the general settlement of the water rights in the Yakima Valley along with the 1908 limiting agreement concerning Ahtanum Creek.⁷¹ On January 23, 1913, the then Secretary of Interior, Wallace L. Fisher, issued a statement of principles to the Director of the Reclamation Service and the Commissioner of Indian Affairs holding the limiting agreement by Secretary Hitchcock above referred to valid and binding.

The rationale of Secretary Fisher is indeed interesting, as he holds that any other course of conduct would mean that the water rights to the Yakima River must forever remain undeterminable as to quantity until the Indian Irrigation Service eventually got around to determining at some indefinite future date what their needs were. That further this would prevent all irrigation development outside of the Indian Reservation.⁷²

Subsequent to the limitation on the rights of the Yakima Indians in the low water flow of the Yakima River, a joint investigating committee of the Senate and House in 1913 came out to the Yakima Valley and held hearings. It then appeared that there was a valid need for more water from the Yakima River to serve Indian Reservation lands and this resulted in the Congressional

⁷¹ Plaintiff's Exhibit No. 11-36; Appendix P. 35.

⁷² Plaintiff's Exhibit No. 11-36; Appendix P. 35.

Act of July 1, 1914 appropriating \$600,000.00 for additional water from the Bureau of Reclamation.⁷³

It will be noted that in the satisfaction of the additional Indian needs, the Department of Interior did not attempt to avoid Secretary Hitchcock's limitation and take the water away from the Sunnyside Valley Irrigation District, Selah Valley Canal System and other irrigation districts involved, but secured the additional water by purchase from storage sources. Appellees further urge that this Congressional Action was in full satisfaction and settlement of all claims to water by the Yakima Tribe of Indians in the Yakima River and its tributaries, which necessarily includes Ahtanum Creek. Thus, in effect, the litigation now before the Court is barred by reason of this settlement also.⁷⁴

For a considerable number of years after the execution of the 1908 Agreement we find administrative interpretation in both the Offices of the Secretary of Interior and the Commissioner of Indian Affairs upholding the validity of the Agreement.

⁷³ 38 Stat. 604, wherein it is stated: " * * * To furnish at the northern boundary of said Yakima Indian Reservation in perpetuity, enough water in addition to the 147 Cu. ft. per second heretofore allotted to said Indians so that there shall be during the low water irrigation season at least 720 cu. ft. per second of water available when needed for irrigation, this quantity being considered as equivalent to and in satisfaction of the rights of the Indians in the low water flow of the Yakima River and adequate for the irrigation of 40 acres of each Indian allotment."

⁷⁴ 38 Stat. 604.

On January 15, 1919 we find E. B. Merritt, Assistant Commissioner of Indian Affairs, writing Marvin Chase, State Hydraulic Engineer, that the agreement would be complied with by the Government.⁷⁵ On June 7, 1929, E. C. Finney, Solicitor in the Department of Interior, advised the Secretary:

“According to a familiar rule, vested rights thus created cannot thereafter be disturbed at least by administrative officers of the Government. Hence, under the circumstances here at hand, I am of the opinion that you would not now be justified in ignoring or attempting to repudiate the agreement entered into in 1908 involving the division of waters of this stream.”⁷⁶

This opinion was further approved on the same day by the First Assistant Secretary. Thereafter on June 18, 1929, Joseph M. Dixon, Acting Secretary of the Interior, advised John H. Lynch, Secretary of the Appellee Irrigation District, that the Department was abiding by the Agreement of 1908.⁷⁷

On August 2, 1930, L. M. Holt, Supervising Engineer of the Indian Irrigation Service at Yakima, advised the Commissioner of Indian Affairs that he was abiding by the agreement of 1908.⁷⁸ On March 18, 1931, E. C. Finney, Solicitor of the Department of Interior, again in an opinion to the Secretary of the Interior, upheld the validity of the agreement, stating:

⁷⁵ Plaintiff's Exhibit 13-J "A"; R. 119; Appendix P. 38-40.

⁷⁶ Page 10, Plaintiff's Exhibit 9; Appendix P. 47-50.

⁷⁷ Plaintiff's Exhibit 11-63; Appendix P. 50.

⁷⁸ Plaintiff's Exhibit 11-70; Appendix P. 54.

"The rights of the Indians and of the whites have been established and grown for over 20 years on the basis of the Agreement of May 9, 1908, and it is my opinion that the rights should not be disturbed by an abrogation of the agreement on the theory that the Secretary of the Interior did not have authority to make the agreement for the Indians."⁷⁹

On April 11, 1931, C. J. Rhodes, Commissioner of Indian Affairs, by telegraph advised L. M. Holt, Supervising Engineer of the Indian Irrigation Service at Yakima, that the Agreement should be upheld under Solicitor Finney's previously mentioned opinion of March 18, 1931.⁸⁰

On March 23, 1932, the Secretary of Interior, Ray Lyman Wilbur in a letter to Lynn J. Frazier, Chairman of the Committee on Indian Affairs in the United States Senate with reference to the hearings then progressing concerning Senate Bill 3998 stated that:

"During the 24 years that have elapsed, undoubtedly equitable and valid property rights founded upon the 1908 agreement have been established in third parties, and according to a familiar rule of law, vested rights thus created cannot be disturbed by administrative officers of the Government. Unless I am prevented by court action, I propose to adhere to the agreement of 1908. I, therefore, have no objection to the enactment of this legislation which I believe will be one step in the final settlement of a dispute running over many years."⁸¹

⁷⁹ Page 6, Plaintiff's Exhibit 9; Appendix P. 56.

⁸⁰ Plaintiff's Exhibit No. 11-79; Appendix P. 65.

⁸¹ Plaintiff's Exhibit No. 11-102; Appendix P. 63-72.

Secretary Wilbur's letter was dated the day after a memorandum received by him from the Commissioner of Indian Affairs claiming the 1908 agreement invalid for unique reasons.⁸²

On January 8, 1952, the Yakima Tribe of Indians filed with the Indian Claims Commission a claim for \$1,-173,300.00 and in the claim it is affirmatively stated that the 1908 agreement has been "continuously to the present recognized and allowed to be enforced" by the Government.⁸³

It can be readily seen that for at least 24 years after the agreement of 1908 was consummated we have had departmental interpretation upholding the validity of the agreement. It has long been established by the United States Supreme Court that construction and interpretation of the Statutes by the Department charged with the enforcement thereof should be respected and upheld.⁸⁴

⁸² Plaintiff's Exhibit No. 11-101; Appendix P. 65-68.

⁸³ R. 149, at page 154.

⁸⁴ *United States v. Johnson*, 124 U. S. 236; 253; 8 S. Ct. 446; 31 Law Ed. 389, wherein it is stated: "In view of the foregoing facts, the case comes fairly within the rule often announced by this court, that the contemporaneous construction of the statute by those charged with its execution, especially when it has long prevailed, is entitled to great weight, and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous."

In *United States vs. Finnell*, 185 U. S. 236, 244; 22 S. Ct. 633; 46 L. Ed. 890, it is stated:

“But if there simply be doubt as to the soundness of that construction,—and that is the utmost that can be asserted by the Government,—the action during many years of the Department charged with the execution of the Statute should be respected, and not overruled except for cogent reasons.”

The interpretation and construction of the Statutes by the Department of Interior such as the case now before the court is entitled to great weight and the Court should be very hesitant to rule invalid a solemn agreement negotiated under these statutes and honored by the contracting parties for such a long period of time.

It is interesting to note that in a District Court case involving the Yakima River where an irrigation district after executing a limiting agreement attempted to evade the terms of the agreement upon the claim that its officers had no power to sign the same, the Irrigation district was given short shrift by the court because they withheld action for a period of two years and the Government had expended money in reliance on the water rights settlement.⁸⁵

⁸⁵ *United States vs. West Side Irrigating Company*. 230 Fed. 284; wherein Judge Rudkin stated: “The corporation, its officers, and stockholders maintained a discreet, if not an intentional silence concerning this action for almost two years, and permitted the government to proceed with its work and with its vast outlay of money in the belief that all water disputes had been settled and adjusted in accordance with its requirements. That the defendant and its stockholders, under these circumstances, should now be estopped to question the authority of the officers or the validity of the contract, does not, in my opinion, admit of question.”

In the case at Bar the Government is attempting to avoid the terms of its own solemn compact by a suit commenced almost 40 years after the execution of the agreement.

(c) STATE ADJUDICATION

On January 15, 1919, the Assistant Commissioner of Indian Affairs wrote Mr. Marvin Chase, State Hydraulic Engineer in Olympia, Washington, that the Government had advised L. M. Holt, Supervising Engineer for the Indian Service, to abide by the 1908 agreement. In the same letter it was further stated that the Commissioner of Indian Affairs Office felt that the State of Washington should take such necessary steps to require the white water users to carry out the terms of the agreement.⁸⁶

On March 27, 1923, the Assistant Secretary of the Interior advised Mr. Chase that the Department would be pleased to cooperate with the State of Washington in the proposed adjudication of Ahtanum Creek as long as the water rights of the Indians were not infringed.⁸⁷ It is thus apparent that the Department of Interior and the Office of Indian Affairs were encouraging the State of Washington to proceed with the proposed settlement of water rights among the non-reservation owners contiguous to Ahtanum Creek. The Department knew with reference to the enforcement of the 1908 Agreement that it was

⁸⁶ Plaintiff's Exhibit 13-J "A"; Appendix P. 38-40; R. 119.

⁸⁷ Plaintiff's Exhibit 13-A; Appendix P. 39.

necessary for the State to determine the priority of use among the non-reservation owners before there could be an enforcement of the 1908 agreement as contemplated by the Department on the part of non-reservation users. When in the letter of March 27, 1923, the Assistant Secretary of Interior spoke of no infringement of the water rights of the Indians, obviously he was not speaking of some vague, indefinite water right to be determined some time in the distant future but he was definitely speaking of the 25% of the waters of Ahtanum Creek allocated to the Reservation under the 1908 limiting agreement.

It is admitted under the pre-trial order that "The United States Government had knowledge of said adjudication and had an opportunity to appear therein but decided against such appearance."⁸⁸

It thus appears that the United States could very well have been a party to the adjudication, if they had so desired, but in view of the obvious fact that only 75% of the waters of Ahtanum Creek were going to be adjudicated, the Government felt that it was not necessary for them to be a party to this proceeding. This is borne out by the Statement of the Supreme Court of Washington in its review of the appeal on the adjudication.⁸⁹

⁸⁸ Paragraph 7, Pre trial order, R. 128.

⁸⁹ In re Ahtanum Creek vs. Annie Wiley Achepohl and Johncox Ditch Company. et al, 139 Wash. 84, wherein the court stated: "Twenty-five per cent of the water of the streams is owned by the United States, and controlled and administered

This was a proceeding in Rem and all parties had a right to participate for the purpose of asserting their claims, if they so desired. It was open and notorious and bound the world.⁹⁰

When the State of Washington was admitted to the Union upon an equal footing with the 13 original states, there was ceded to it jurisdiction to adjudicate the rights of all persons owning property, including water rights within the boundaries of the State.⁹¹

Further, the United States by its Constitution reserved to the State of Washington "The powers not delegated to the United States by the Constitution nor prohibited to the states respectively."⁹²

We cannot see how the United States after encouraging the State of Washington to proceed with the adjudication and tacitly acquiescing to the findings of this adjudication, can now be permitted in a proceeding 25 years later to in effect have the State Court's proceeding declared a nullity and meaningless.

by the Indian Bureau for the use and benefit of the Yakima Indian Lands under irrigation, leaving 75% of the water to be adjudicated herein."

⁹⁰ R.C.W. 90.04.020; U. S. vs. Ahtanum Irrigation Dist., 124 F. Supp. 818; page 836.

⁹¹ Pollard vs. Hagan, 3 How. 212; 44 U. S. 212; 11 Law. Ed. 565.

⁹² Amendment 10, Constitution of the United States.

(d) LACHES AND ESTOPPEL

The United States in this proceeding admittedly is representing the Yakima Indian Tribe rather than the public at large. It is not acting as a sovereign in a governmental capacity but rather acts in a proprietary capacity when bringing this action as a guardian for its Indian wards and performing duties for them.⁹³ Estoppel, laches and the principle of time limitation apply to the appellant in this action.⁹⁴

The United States Supreme Court has held that the defense of laches may be maintained in a suit to set aside and establish equitable title to land wrongfully acquired from an Indian 27 years previously.⁹⁵

In another case involving Indian rights the Eighth Circuit held that an Indian was barred by laches from maintaining suit for the recovery of a claimed allotment where the certificate of selection issued to him by the Agent was subject to the approval of the Secretary of Interior, which was not obtained, and the suit was not commenced until 35 years later, and 27 years after the

⁹³ Board of Commissioners vs. United States, 139 Fed. (2nd) 248; C.C.A. 10-1943.

⁹⁴ U. S. vs. Beebe, 127 U. S. 338.

⁹⁵ Felix vs. Patrick, 145 U. S. 317; 36 Law Ed. 719. wherein it was stated: "By conceding that the plaintiffs were incapable so long as they maintained their tribal relations of being affected with laches, and that these relations were not dissolved until 1887 when they were first apprised of their right to this land, it does not necessarily follow that they are entitled to the relief demanded by this bill."

land had been allotted to another Indian to whom the patent had issued.⁹⁶

Again in the case of *United States vs. Winona and St. Peter Railroad Co.*, the Government erroneously or irregularly patented lands to or for the benefit of the defendant. It was argued that the grants were void in that the Land Department could not convey away public lands in disregard of the will of Congress. The court therein held that the equitable considerations favored the defendants.⁹⁷

⁹⁶ *Lemieux vs. U. S.*, 15 Fed. (2nd) 518, C.C.A. 8th, in which the court stated at page 522: "In *Badger vs. Badger*, 2 Wall. 87, 17 L. Ed. 836, it was said that a party who makes an appeal to the conscience of the chancellor should 'set forth in his bill specifically what were the impediments to an earlier prosecution of his claim, how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance, and how and when he first came to a knowledge of the matters alleged in his bill; otherwise the chancellor may justly refuse to consider his case, on his own showing without inquiring whether there is a demurrer or formal plea of the statute of limitations contained in the answer.' *Richards vs. Mackall*, 124 U. S. 183, 8 S. Ct. 437, 31 L. Ed. 396; *Felix vs. Patrick*, 145 U. S. 317, 12 S. Ct. 862, 36 L. Ed. 719; *Schrimscher vs. Stockton*, 183 U. S. 290, 22 S. Ct. 107, 46 L. Ed 203; *Bluejacket vs Ewert* (C.C.A.) 265 F. 823.

"In the opinion in the case of *Moran vs. Horsky*. 178 U. S. 205, 20 S. Ct. 856; 44 L. Ed. 1028. appears this pertinent language; 'One who having an inchoate right to property, abandons it for fourteen years, permits others to acquire apparent title, and deal with it as theirs, and as though he had no right, does not appeal to the favorable consideration of a court of equity' . . ."

⁹⁷ 165 U. S. 463; 41 L. Ed. 789, the court stating: " * * * No fraud or wrong is imputable to the company (defendant). No effort to secure a misconstruction by the land department, but only an acceptance of the then settled rule of construction and the taking of lands which, under such construction, it was entitled to receive. Conceding that the construction was erroneous, yet it was one made by the officers of the department charged with the duty of administering the grant and determin-

Further with reference to the doctrine of Laches and Estoppel we wish to point out that the 1908 agreement following its execution was filed for record in the office of the Auditor of Yakima County, Washington, in Volume 72 of Deeds, page 35⁹⁸ and thus became a part of the title and particularly the water rights title of all lands securing water out of the Ahtanum Creek.

Obviously many bona fide purchasers without any knowledge whatsoever of recent claims made on behalf of the Indians for more water, have purchased lands along the north side of Ahtanum Creek, and the Government's efforts herein to make worthless their lands so purchased is unconscionable.

It is asserted by the appellant⁹⁹ that the appellees herein have prevented this controversy from being litigated. The Government obviously overlooks the fact that it was the one who withheld the filing of its bill in equity

ing what lands did and what did not pass, the only tribunal to which the company could then apply, and upon whose rulings it was bound to act. Many years have passed since the certification, and since the company in reliance upon the title it believed it had acquired has disposed of the lands, and other parties have become interested in and have dealt with the lands as private property. Contracts have been entered into, suits maintained—carried even to this court—and decrees and judgments entered and rendered in full reliance upon the title supposed to have been conveyed. Surely after such a lapse of time, and after so many transactions in respect to these lands, the appellees (defendants) are justified in saying that they have large claims upon the equitable consideration of the courts."

⁹⁸ Pre trial order, paragraph 8; R. 128.

⁹⁹ Appellant's brief, page 25.

in the first instance in 1907. If any litigation was to be filed concerning the waters of Ahtanum Creek, that was the time to do so.¹⁰⁰ Many times, as evidenced herein¹⁰¹ the Government upheld the 1908 Agreement by administrative interpretation. While it is true the Ahtanum Irrigation District did not wish the expense and uncertainty that is a part of every lawsuit, it was, nevertheless, the Government's own act, as stated by the trial court¹⁰² that delayed the commencement of this case until long after innocent people had secured vested rights.

It is further submitted that the Indian wards, for whom the appellant claims to be acting in this case, have in effect abandoned their alleged claim to the waters of Ahtanum Creek over and above an amount of 25% by filing their claim against the United States.¹⁰³ By filing this claim they have in effect confirmed the practical application of the 1908 Agreement over the years and have admitted its binding effect. Parenthetically at this point it might be well to mention that if it is felt that the Yakima Indian Tribe has been unjustly dealt with, the blame falls squarely upon the United States and the proper remedy lies either in bringing more water to the Ahtanum Valley by means of the Klickitat Project, which is feasible,¹⁰⁴ or by a payment of money damages in ac-

¹⁰⁰ This brief, *supra*, page 8.

¹⁰¹ Appendix B, page 7, *et seq.*

¹⁰² R. 425-426.

¹⁰³ R. 149.

¹⁰⁴ R. 129.

cordance with the claim above referred to. This suggestion was first made by Chief Engineer Code at the time of his original investigation and report.¹⁰⁵

The appellant's standing in equity clearly does not entitle it to any relief. Equitable maxims are applicable to the State as well as to individuals.¹⁰⁶ Historically, courts of equity have applied the maxim that "he who comes into equity must come with clean hands"¹⁰⁷ and the appellant in seeking to overthrow its own solemn agreement of 1908 relied upon for years by its citizens, does not come into equity with clean hands. It has also been often stated that "Equity aids one who has been vigilant and will refuse relief to one who has been dilatory or wanting in diligence in prosecuting his cause of action."¹⁰⁸

Certainly it cannot be said that the appellant has been diligent or vigilant in prosecuting this action. The maxim that "he who seeks equity must do equity" has application herein. Can it be said that the appellant in seeking to set aside the agreement of 1908 has in any way offered to make the appellees whole? On the contrary, they are seeking to take away from the appellee the fruits of 80 years of work and saying that the ap-

¹⁰⁵ Plaintiff's Exhibit No. 11-6; Appendix 13.

¹⁰⁶ 19 Am. Jur. Sec. 449, page 311; People's National Bank vs. Marye, 191 U. S. 272; 48 Law Ed. 180.

¹⁰⁷ *Tompkins vs. Wheeler*, 16 Pet. 106; 10 Law Ed. 903.

¹⁰⁸ *Baker vs. Cummings*, 169 U. S. 189; 42 Law Ed. 711.

pellees should not have relied upon the acts of the appellant's responsible heads of the Department of Interior.

More than 80 years have now passed since the lands along the north bank of Ahtanum Creek were settled and water diverted for the irrigation of those lands. As the lower court so aptly stated: These pioneer settlers engaged "in building an empire out of the wilderness."¹⁰⁹ Schools and churches have been built, several small towns, namely Wiley City, Ahtanum and Tampico, have grown up in the Ahtanum Valley. The present water users and their ancestors before them have invested their life's work and savings in these homes, ranches and farms, relying upon their right to receive the life-giving waters of Ahtanum Creek. The appellant did not contest that right in the State court or elsewhere, although it had full knowledge of all facts and the law applicable thereto, until the commencement of the present suit in 1947. As discussed *supra*, where the situation was reversed and an irrigation district was attempting to avoid a limiting agreement upon which the Government had relied¹¹⁰ it was held that the passage of a mere two years would estop the irrigation district from questioning the validity of the limiting agreement. Surely in good conscience the lapse of 39 years between the 1908 Agreement and the com-

¹⁰⁹ United States vs. Ahtanum Irrigation District, 124 F. Supp. 818, at page 841.

¹¹⁰ United States vs. West Side Irrigating Company, 230 Fed. 284.

mencement of this suit estops and bars the Government from now questioning the validity of this agreement affecting 10,000 acres of land in the Ahtanum Valley and the lives and fortunes of 900 families.

ANSWER TO ARGUMENT OF APPELLANT

(a) DISMISSAL OF PLAINTIFF'S COMPLAINT PROPER UNDER THE LAW AND THE EVIDENCE.

Appellant has detailed evidence on which it claims judgment.¹¹¹ That evidence fails to recognize a number of important elements. A large percentage of allotted lands has been sold or leased to operators other than Indians.¹¹² The appellant is not representing anyone in this case except its Indian wards.¹¹³ The irrigation from Ahtanum Creek in 1847 was practiced not by the Indians but by the Catholic Mission and all on the north side of the Creek.¹¹⁴ The evidence fails to show the use of any specific quantity of water on any particular tract of Reservation land. The wards of the appellant never claimed possession or control of waters in excess of 25% of the flow, to which the appellees admit they are entitled.¹¹⁵ No evidence was adduced to show that any portion of the 75% of the waters of Ahtanum Creek was ever used on any particular lands in the Reservation. On the contrary

¹¹¹ App. Br. 21-24.

¹¹² R. 129, 474.

¹¹³ R. 374.

¹¹⁴ Plaintiff's Exhibit 12.

¹¹⁵ R. 149 to 156.

the appellees show a judicial finding of appropriation and beneficial use of 75% of the flow on the north side which has been adjudged to be appurtenant to certain tracts, entitling such tracts to specific quantities of water.¹¹⁶ The burden is on the appellant to establish a valid claim to more than 25% of the flow of Ahtanum Creek. This they have failed to do and a dismissal is therefor a proper disposition of the appellant's claim.

The appellant in bringing this action is bound by the usual rules of evidence and proof. Blame for the protracted and contentious controversy rests squarely on the appellant " * * * repeated efforts of the United States of America to initiate these proceedings * * *¹¹⁷" does not present a proper statement or one made in good faith. There may be some explanation for the Attorney General's failure to file the bill in equity in August of 1907.¹¹⁸ Then was the time to litigate this problem instead of after a delay of 40 years and after equities have arisen and laches and estoppel apply.¹¹⁹

The appellant is not bringing this action " * * * to defend rights to the use of water reserved * * * ."¹²⁰ It seeks to recover the right to the use of water that passed beyond its control 40 years before this case was

¹¹⁶ Defendant's Exhibit 139, In re Ahtanum Creek, 139 Wash. 84; 245 Pac. 758.

¹¹⁷ App. Br. 25.

¹¹⁸ Plaintiff's Exhibit 11-14; 11-17; Appendix 12-13.

¹¹⁹ See supra, page 31.

¹²⁰ Appellant's Br. 27.

filed. The claim of implied reservations will be discussed later in this brief.¹²¹

(b) CLAIMED INVALIDITY OF AGREEMENT OF MAY 9, 1908

Appellant claims in its complaint and its contentions in the pre-trial order that the agreement of 1908 is invalid. The citation to the pre-trial order is not to an agreed fact but to appellant's contention where there is no mention of so-called "subordinate officials."¹²² The appellant's oft repeated slur on the Secretary of the Interior, the Commissioner of Indian Affairs and the Chief Engineer comes with poor grace from counsel whose predecessor in office had a signed bill in equity resting in his office when the agreement of 1908 was made.¹²³

The United States District Attorney represented the Attorney General and participated in the settlement made to "avoid litigation."¹²⁴

The statement that no official could " * * * relinquish * * * 75% of the natural flow of Ahtanum Creek * * * "¹²⁵ pre-supposes that the appellant was entitled to the use of all of the flow of the creek. In not one case cited by the appellant is it held that the Winters case doctrine au-

¹²¹ See *infra*, page 50.

¹²² R. 131.

¹²³ Plaintiff's Exhibit 11-6, 11-18, 11-19, 11-21, 11-27; Appendix A & B.

¹²⁴ R. 547 to 552.

¹²⁵ Appellant's Brief 31.

thorizes the taking of the entire flow of a border stream by the Indians on a Reservation.

The apportionment by the Agreement of 1908 was the result of negotiation.¹²⁶ Acreage was a factor. Appellant argues the agreement is improper because no one knew the extent of future development.¹²⁷ The fallacy of this argument is patent in that its application would permit the removal of all the water from border streams to the complete destruction of property and rights of other users of the water in the stream. Such a rule was never intended by the Winters case doctrine and is not so held.¹²⁸ Administrative and congressional interpretation so show.¹²⁹ The Winters case was decided by the Supreme Court of the United States in January of 1908. Under the rule of contracts, often applied, the Winters case must be read into and become a part of that contract. For the settled law of the land at the time a contract is made becomes a part of it and must be read into it.

Likewise, it is presumed that the parties bargained with each other on the basis of existing law, which would include the Winters decision.¹³⁰

Appellants make no showing of the lack of authority

¹²⁶ R. 547, 548.

¹²⁷ App. Br. 32.

¹²⁸ See *infra*, page 41.

¹²⁹ Plaintiff's Exhibit 11-36; 38 Stat. 604.

¹³⁰ *Great Northern Railway Company vs. Sunburst Oil and Refining Co.*, 287 U. S., 358, page 362; 77 Law Ed. 360, at page 365.

on the part of the Secretary of Interior to enter into the agreement of 1908, and do not show any failure on his part to obtain the approval and authority of the Attorney General.

In the absence of any proof to the contrary, there is a strong presumption that public officers have properly discharged the duties of their office and that all acts performed are within the sphere of their official duty.¹³¹ The presumption also applies to cabinet officers and their assistants.¹³²

(c) THE WINTERS CASE DOCTRINE

The appellant seeks by its brief to enlarge on the Winters case doctrine.¹³³ Briefly stated, that doctrine is that the Indians gave up certain rights when they entered into the Treaty under which the Reservation was created, and the rights not specifically granted were impliedly reserved. The reserved rights included the right to the use of a portion of the waters in a border stream for irrigation of lands on the Reservation.

The Winters case had for consideration a later Treaty than the one here involved and three successive treaties had resulted in the contraction of the Indian Reservation

¹³¹ U. S. vs. Chemical Foundation, 272 U. S. 1, at page 15; 71 Law Ed., 131 at page 143. Quinlan vs. Green County, 205 U. S. 410; 51 Law Ed. 860; Vitelli vs. U. S., 250 U. S. 355; 63 Law Ed. 1028.

¹³² U. S. vs. Carr, 132 U. S. 644, at page 653; 33 Law Ed. 483, at page 486.

¹³³ App. Br. 33 to 37.

until one boundary was fixed as the center of Milk River. In that case the issue was not the reservation of all of the waters of Milk River, such as the appellant claims here. The non-reservation owners on Milk River conceded that if the Indians were entitled to any waters, their request was a reasonable one.¹³⁴

There is a misconception reflected in the appellant's argument as to the rule in the Winters case. The early case¹³⁵ holds that the right to 5000 inches of water was sufficient to satisfy the reasonable needs of the Indians and injunction issued accordingly.

The decision of the Winters case contained certain language which in the absence of a clear understanding of the issues before the court is susceptible to misinterpretation. In at least two instances the United States Supreme Court refers in general terms to a reservation of "the water." The Court did not say that all of the waters of Milk River were reserved and what the Court meant by its use in several instances of the term "the water" must be gathered from the context. The position of the appellants, who were the defendants in the lower court, was that the Treaty of 1888 did not effect a reservation of any portion of the water of Milk River. The defendants did not, however, deny the need of the Indians for 100 cfs. of water. Their contention, however, was that

¹³⁴ 207 U. S., 564.

¹³⁵ Winters vs. U. S., C.C.A. 9 (1906) 143 Fed. 470.

no water was reserved for the Indians, but if there was a reservation of any portion of the water, the amount claimed was a fair amount to satisfy the reasonable needs of the Indians. The result was that the Supreme Court under the pleadings as presented had only two possible alternatives: To hold that there had been a reservation of 100 cfs. or that there had been no water reserved under the Treaty. It therefore becomes clear that when the Court refers to a reservation of "water," it means the water at issue in the case; that is 100 cfs. of the water of Milk River, not to the total flow of the stream as is claimed by the appellant in this case.

The only case that passes directly upon the question of the rights to water in a boundary stream as between the Indian allottees and the patentees from the United States of America, is the case of *United States v. Walker River Irrigation District*.¹³⁶ This court specifically holds in the Walker River case that a limitation upon the quantity of waters which could be claimed is that which will satisfy the reasonable needs of the Indians. In the Walker River case the United States endeavored to enlarge the definition of "reasonable needs" by setting up a criterion by which it could be measured. It was argued that the amount of water reserved depended not upon the actual needs of the Indians but upon the quantity of water needed to supply all of the irrigable lands upon a particular res-

¹³⁶ (C.C.A. 9) (1939), 104 F. 2d. 334.

ervation. This court in that case rejected that theory and held that the acreage of land which happened in the particular case to be irrigable from the streams flowing through the reservation was a purely fortuitous circumstance, not necessarily having any bearing upon the actual needs of the Indians.

The rule of "reasonable needs" as applied in the Walker River case does not appear to apply in the Ahtanum case. Any reservation of waters was not by express but by implied terms and should be given no broader scope than is necessary to carry out the purposes intended in the Treaty. There are ample waters arising on the reservation or supplied by bordering streams to more than satisfy the needs and requirements of all of the Indians. Certainly therefore the appellant in this case is not correctly stating its position and is not the real party in interest when it endeavors to apply the theory in the Walker River case and the theory in the Winters case to its claimed right of recovery. The reasonable needs of the Indians have been more than satisfied.¹³⁷

A District Court case decided in 1916¹³⁸ recognizes the limitation on the Winters case. Therein the court says:

"The same officers of the government charged with the protection of the Indians also executed its land

¹³⁷ See R. 474 to 476 in which appellants' witness could name only 11 Indian farmers.

¹³⁸ United States v. Wightman (D. C. Ariz. 1916) 230 F. 277.

laws, for both are under the charge of the Secretary of the Interior, and his action in approving the sale of the land with water rights is of equal dignity and binding force on the government as the demand now made by his subordinate with his approval for the use of the waters by the Indians. * * * ” (P. 284)

Thus it is recognized eight years after the Winters case was decided that it is not of universal application and does not apply to the reservation of all of the waters of a stream.

The Conrad case recognizes the rule in the Winters case¹³⁹ and holds that there is an implied reservation of waters to irrigate certain lands on the reservation but the Walker River case appears to be the last pronouncement on the subject which limits the rights of water to the reasonable needs of the Indians then existing.

Between the Wightman case and the case of Walker River Irrigation District,¹⁴⁰ the Courts have been confronted with several cases involving Indian water rights. None of them involve the rights of reservation against non reservation lands. Two of these cases involve questions relative to the interpretation of express Treaty provisions reserving water rights to the Indian allottees.¹⁴¹ These cases do support the rule that Indian Treaties must be construed favorably to the Indians, but they appear to

¹³⁹ Conrad Investment Co. v. U. S. (C.C.A. 9, 1908) 161 F. 829.

¹⁴⁰ 104 F. 2d. 334.

¹⁴¹ Skeem v. United States (C.C.A. 9, 1921) 273 F. 93, and United States v. Hibner, (D. C. Ida. 1928) 27 F. 2d. 909.

be little or no authority for the rule defining rights of reservation against non-reservation land as in this case where the rights exist, if at all, by virtue of an implied reservation.

Another case involving Indian water rights is that of *United States v. Powers*.¹⁴² This case involved a controversy between the United States, representing the rights of an Indian Irrigation project within the reservation, as against white successors to Indian allottees, who had constructed their own irrigation system on other portions of the reservation. The court held that the whites had succeeded to the rights of their Indian predecessors and that those rights were on a parity with the rights of the Indians on the reservation. The decision in effect holds that all of the parties whose rights are before the court were tenants in common in whatever water right the reservation possessed.

The last three cases cited appear to have no bearing on the question as to what quantity of water can be claimed by an Indian reservation. In the decision in the Walker case this Court apparently found it unnecessary to distinguish the Powers case even though the Powers case and the Walker case came before this court within about one year of each other.

¹⁴² (1939), 305 U. S. 527, 83 L. Ed. 330. Affirming *United States v. Powers*, C.C.A. 9, 1938, 94 F. 2d. 783.

In the McIntyre case¹⁴³ there is involved an inter reservation dispute. McIntyre's predecessor had been granted an appropriative right by the State of Montana to a portion of the waters of Mudd Creek for use on reservation land. McIntyre commenced suit to establish the superiority of this appropriative right over that of an Indian Irrigation Project on the same reservation. The suit was dismissed upon the ground that Montana law relative to the appropriation of water had no application to reservation lands. This holding is similar to the holding in our Supreme Court.¹⁴⁴

The Walker River case¹⁴⁵ is the one which makes a square issue as to the quantity of water which may be claimed by the Indians collectively as against the whites on non reservation lands. The Walker River Indian Reservation was established by executive order in 1859. Use of the water by the whites above the reservation considerably depleted the supply available for the reservation. There were approximately 10,000 acres of land on the reservation susceptible to irrigation. However, only about 2100 acres were actually under irrigation. It was the position of the United States that there was reserved by the executive order of 1859 creating the reservation, sufficient water to irrigate all the irrigable lands or 150 cfs. of

¹⁴³ United States v. McIntyre (C.C.A. 9, 1939) 101 F. 2d. 650.

¹⁴⁴ Gough v. Taylor, 110 Wash. 631, 188 Pac. 458.

¹⁴⁵ United States v. Walker River Irrigation District (C.C. A. 9, 1939) 104 F. (2d) 334.

water. This claim is stated by the Court as follows: (p. 335)

“The claim of the government, asserted on behalf of the Indians living on the reservation, is that, to the extent necessary to supply the irrigable lands, the waters of the stream were reserved. * * *

“We hold that there was an implied reservation of water to the extent reasonably necessary to supply the needs of the Indians. There remains for decision the question as to the quantity of which the United States is entitled. The problem is one of great practical importance, and a priori theories ought not to stand in the way of a practical solution of it.

“The decree is reversed with directions to enter a decree adjudging the United States to be entitled to the continuous flow of 26.25 cubic feet of water per second * * * for the irrigation of 2,100 acres of land on the reservation * * *.”

Thus it appears that the only case which seems to fix the maximum limit upon the quantity of water impliedly reserved for the Indians adopts the yard stick as the quantity of water “reasonably necessary to supply the needs of the Indians.”

Applying this rule to the Ahtanum case gives to the appellees the protection first of the contract of 1908, second the Act of 1914,¹⁴⁶ third, the adjudication of the water rights by the State of Washington;¹⁴⁷ fourth, the administrative interpretation of the acts and conduct of the re-

¹⁴⁶ 38 Stat. 604.

¹⁴⁷ Deft. Ex. 139.

spective parties, including the determination by the Yakima Indians to make claim against the Indian Claims Commission, recognizing and stating therein that they were limited on the date of the claim¹⁴⁸ to 25% of the flow of the stream.

We respectfully submit, therefore, that under the rule in the Winters case there has been and is in the contract of 1908 a satisfaction of the reasonable needs of the Indians in accordance with the Walker River case and in accordance with the Winters case, which case was decided by the Supreme Court before the contract was executed.

The reasonable needs of the Indians on the Yakima Reservation is at most all appellant can claim under the implied reservation. Here the allowance by Congress in 1914 gave the Yakima Reservation water for 70,000 acres of land.¹⁴⁹ This was enough water for 40 acres of irrigated land on every Indian allotment. This certainly should have satisfied the reasonable needs of the Indians. There were 2401 Indians on the Yakima Reservation in 1937.¹⁵⁰ This would mean 29 acres of Indian land for every Indian, man, woman and child, on the Reservation and would ex-

¹⁴⁸ R. 149.

¹⁴⁹ 38 Stat. 604.

¹⁵⁰ Annual Report of the Secretary of Interior, 1937, page 261.

ceed by four to seven times the amount held to be reasonable in the Walker case.¹⁵¹

(d) FINDINGS ON TREATY OF 1885

The Treaty made reference to Ahtanum Creek and the South Fork as the north boundary of the Reservation.¹⁵² In the Winters case the boundary of the Reservation is the center of Milk River.¹⁵³ This fact is of importance and commented upon by the Supreme Court in expressing the doctrine of implied reservation.¹⁵⁴

If important in that case, the failure to mention it here is likewise important, especially since the patents to the Indian wards follow Government surveys which are to the meander line on the south bank of the stream.¹⁵⁵ Likewise, the patents of the lands on the north side are to the meander line.¹⁵⁶ The findings of the Court, therefore, that Ahtanum Creek is not included in the Yakima Indian Reservation has basis in both the patents and the express words of the Treaty.¹⁵⁷

That some of the water of Ahtanum Creek arises

¹⁵¹ U. S. vs. Walker, C.C.A. (1939), 104 Fed. (2nd) 334.

¹⁵² R. 16, Plaintiff's Exhibit 1.

¹⁵³ 207 U. S. 564.

¹⁵⁴ "Why was the northern boundary of the Reservation located in the middle of Milk River unless it was for the purpose of reserving the right to the Indians to the use of said waters for irrigation as well as for other purposes." Winters vs. U. S., 207, U. S. 564.

¹⁵⁵ Plaintiff's Exhibit 4-b, 4-d.

¹⁵⁶ Defendant's Exhibit 142.

¹⁵⁷ Appellant's brief 37.

outside of the Reservation is in line with the Winters case.¹⁵⁸ Applying the statement above quoted literally¹⁵⁹ the implied reservation would be to an amount of the flow in the south fork which is less than 25% of the total flow.¹⁶⁰ Hence the allowance by the agreement of 1908 enlarges the claim of implied reservation which might be made under the literal interpretation of the Winters case.

Appellant has misstated the findings when he quotes that there is no reservation by the Treaty of 1855 "either express or implied."¹⁶¹ The findings state "that there was no reservation of any water rights to Ahtanum Creek by the Treaty of 1855 either express or implied * * * *adverse to the defendants* * * * ." ¹⁶² In the opinion the learned trial court states:

"Here, in accordance with previous decisions, we decide that there was a reservation of the use of some water of Ahtanum."¹⁶³

The reservation was of 25% of the flow under the agreement of 1908 or about 20% if the reservation is limited to the flow of the South Fork. There is no claim that the landowners on the north side encroached on the 25% of the flow for the "reasonable needs" of the Indians.¹⁶⁴

¹⁵⁸ Supra, Appellant's brief 33.

¹⁵⁹ See footnote No. 152.

¹⁶⁰ Plaintiff's Exhibit 4-e.

¹⁶¹ Appellant's brief 39.

¹⁶² R. 161, Findings of Fact No. 5, emphasis added.

¹⁶³ U. S. vs. Ahtanum Irrigation District, 124 Fed. Supp. 818, 831.

¹⁶⁴ Appellant's brief 39.

Counsel again purports to assert a right to all of the waters of Ahtanum without so stating. That the appellees have always asserted a claim to 75% we do not deny, but appellees do deny that they have infringed on the reserved amount of 25%, which is all the appellant is entitled to claim. From the repeated assertions of the appellant that they claim all of the flow of Ahtanum, we conclude that they make no claim to any lesser amount. The question suggested is: "If there is any infringement, where is it and to what extent?" Appellant claims error but nowhere answers that question. The court's finding that there was little or no thought of irrigation in 1855 is emphasized by the Exhibit cited by appellant.¹⁶⁵ That Exhibit constrains statements contrary to appellant's claim. "The practice of artificial irrigation in the Territory (now State) of Washington had the beginning and progressive development on the Ahtanum Mission * * * , and while some claims have been made that the Indians of this area first practiced the art, the evidence offered is not convincing. The probabilities are all to the contrary. Their habits of living were nomadic; they lived on the wild game, fish and wild roots and berries. They had and to a large extent still have a marked distaste and disinclination to till and crop the soil * * * ." ¹⁶⁶

The statement is made that our Nation would not

¹⁶⁵ Appellant's brief 40.

¹⁶⁶ Plaintiff's Exhibit 12, page 2, of the Beginning of Irrigation in the State of Washington.

force the Indians onto arid land without waters.¹⁶⁷ The appellant has done worse. It has entered into an agreement with non-reservation owners,¹⁶⁸ encouraged them to adjudicate 75% of the flow of Ahtanum,¹⁶⁹ ignored an adequate supply of water from the Klickitat River, which arises and flows entirely on the Yakima Reservation,¹⁷⁰ and now seeks in this action to recover all of the water granted to the non-reservation owners. The reasonable needs of the Indians were satisfied by the agreement of 1908.

Patents have issued to the north side land owners without any express reservation of water rights.¹⁷¹ Appropriation and beneficial use is recognized as the method of acquiring a water right.¹⁷² The appellees have acquired such rights for the land north of Ahtanum Creek, which is a border stream and to which we do not feel the rule cited by appellant from the Federal Power Commission case applies.¹⁷³

The State Law in Washington is as stated in the findings.¹⁷⁴ The common law right of a riparian owner is preserved. Likewise, the statutory right of appropria-

¹⁶⁷ Appellant's brief 41.

¹⁶⁸ R. 26; Plaintiff's Exhibit 11-27 Appendix P. 1.

¹⁶⁹ Defendant's Exhibit 139.

¹⁷⁰ R. 450 and 129.

¹⁷¹ Defendant's Exhibit 141, 142, 142-A.

¹⁷² Appellant's brief 41.

¹⁷³ Federal Power Commission vs. State of Oregon, 349 U. S. 435 (1955); Hough vs. Taylor, 110 Wash. 361; 188 Pac. 458.

¹⁷⁴ R. 161, Finding of Fact No. 8; Appellant's brief 41.

tion is recognized by Washington.¹⁷⁵ A riparian owner, however, may lose his right to the use of water in a stream to a subsequent appropriator who applies the water to a beneficial use, if the riparian owner does not.¹⁷⁶

The court found that the appellant confirmed the rights of appellees to lands and waters outside the Yakima Reservation.¹⁷⁷ This is claimed as error without any supporting references except Appendix C of Appellant's brief.¹⁷⁸

We refer in answer, to appendix B of this brief. to the failure of the Attorney General to file his bill in equity, to the construction placed on the agreement of 1908 before and after its execution, to the statement of the solicitor and three different Secretaries of Interior as well as to the Act of 1914,¹⁷⁹ and the Reclamation Act of July 17, 1902.¹⁸⁰

Such statutory enactments and interpretations of the Treaty are similar to the interpretation made by the Supreme Court of the State of Oregon to the similar Treaty in *Byers vs. Wa-Wa-Ne*, 85 Ore. 617; 169 Pac. 121.

Appellant again attacks the agreement of May, 1908.¹⁸¹

¹⁷⁵ C. Horowitz Riparian and Appropriation Rights to the Use of Waters in Washington, 7 Wash. Law. Rev. 197.

¹⁷⁶ *Brown vs. Chase*, 125 Wash. 542; 217 Pac. 23.

¹⁷⁷ R. 162, Findings of Fact No. 13.

¹⁷⁸ Appellant's Brief 43.

¹⁷⁹ 38 Stat. 604.

¹⁸⁰ 32 Stat. 388.

¹⁸¹ Appellant's Brief 43.

The "subordinate officials" are named above, to which should be added the United States District Attorney. There is apparently an intentional failure to recognize two basic principles of law which are (a) That there is a strong presumption of validity and legality following the acts of all public officials,¹⁸² (b) That since the Winters opinion was filed in January 1908 and was the settled law of the land at the time the contract was entered into on May 9, 1908, it became a part of that contract and must be read into it just as if an express provision to that effect were inserted therein.¹⁸³

(e) STATE ADJUDICATION WATER WASTE

The appellant objects to the finding of fact on the State adjudication of the right to the use of 75% of the water of Ahtanum Creek.¹⁸⁴ The claim is made that there is not a scintilla of evidence to support the conclusion that the adjudication was encouraged.

The appellant must admit that its agents stated that they were complying with the agreement for the division of water, being the agreement of 1908.¹⁸⁵ The Assistant Commissioner of the Office of Indian Affairs stated that he felt justified in asking the State of Washington to take steps with respect to the white water users to require

¹⁸² See supra page 41.

¹⁸³ See supra, page 40.

¹⁸⁴ Appellant's Brief 45, 54.

¹⁸⁵ R. 119, 120.

them to carry out their part of the agreement. The Commissioner's letter of September 17, 1923 to the Supervising Engineer of his Department would appear to be just as expressive and a like encouragement.¹⁸⁶

Objection to the finding of fact on the possession and use of water on the Reservation would appear to criticize the learned Trial Court in a finding which, in our judgment, should be joined in by the appellant.¹⁸⁷ If the stream is outside of the Reservation appropriation and beneficial use might establish the right to the use of the water as appurtenant to certain tracts of land. Counsel has failed to establish that the water is appurtenant to any particular tract of land. Counsel will agree that he is claiming that the water if owned by the United States of America, and if the United States is entitled to maintain this action, is not appurtenant to any particular tract of land. Counsel, however, states that the water is an interest in real estate,¹⁸⁸ but at no place in his brief does counsel point out to which particular real property the water is appurtenant. He apparently seeks further in his brief to quiet the title to all of the flow, maintaining that it is not necessary to show that any person was in possession of any particular portion of the flow of the water in the stream.

The argument made by counsel is, we believe, fal-

¹⁸⁶ R. 120.

¹⁸⁷ Appellant's Brief 45 to 48.

¹⁸⁸ Appellant's Brief 45.

lacious in several particulars. The appellant is seeking to reclaim the possession and title from the appellees of the remaining 75% of the flow of the stream. This can only be done by proving a superior title. The appellant must recover on the strength of its own title, not on the weakness of the title of the appellees. The court has found and concluded that the appellant had no title or right to the additional 75%. The finding and conclusion that counsel has failed to establish possession and use of any portion of the 75% on any property in the reservation is an additional ground for holding that the appellant is unable to recover and that the dismissal is a proper judgment.

If counsel's other argument is correct that the stream is within the Reservation, and therefore the right to appropriate the waters under the Desert Land Act, does not apply, we conclude that the water cannot be appurtenant because the users of the water are tenants in common¹⁸⁹ in whatever water right the Reservation possesses.

This is not a quo warranto proceeding in which a person may be required to establish his right to an office or to property. It is necessary that the appellant recover, if at all, on the strength of its own title to the additional 75% of the water as claimed.

Appellant has never defined what right it claims.

¹⁸⁹ U. S. v. Powers (1939), 305 U. S. 527.

¹⁹⁰ R. 470.

The appellant is asserting the right to the entire flow of the stream.¹⁹⁰ We have endeavored to point out that the Winters case does not in any particular lend support to the claim that a border stream is even by implied reservation to be used entirely on the reservation. There are obligations on the part of the United States of America to the landowners who have received patents, as well as to the Indians.

The appellant in asserting a claim must first establish its right by a fair preponderance of the evidence. As we read the record¹⁹¹ the Court holds that the appellant has failed to establish any right to the 75% of the flow of Ahtanum Creek superior to the rights of the appellees.¹⁹² The State adjudication was held to be binding upon the United States. That adjudication, encouraged by the appellant, divided the 75% of the flow among the landowners on the north side of Ahtanum Creek. For the appellant to sit idly by and watch the process of adjudication in operation is to create a condition which will estop the appellant. The adjudication did not infringe on any rights then claimed by the appellant for its Indian wards. Certainly if such a claim were being made it was then encumbent upon the appellant to make that claim. There could be no question about the estoppel if the appellant were a private party. We submit this phase of the case

¹⁹¹ R. 164, 165.

¹⁹² Appellant's Brief 48 to 54.

on our previous argument as to the *validity* of adjudication.

The appellant asserts that there is evidence and proof of the waste of water by the non-reservation landowners.¹⁹³ As proof of that waste there is cited an isolated instance of what counsel characterizes as "wasted water from Ahtanum Creek, hub deep in the highway * * * ." The testimony does not seem to sustain counsel's statement as the record shows the testimony to be " * * * we went through a puddle about 6 or 8 inches deep."¹⁹⁴

The rank growth of tules, water grass and cattails is described as being evidence of the waste of water. The testimony, however, does not so show. The tules and cattails were on the portion of the project at a point where there existed a high water table. The evidence would therefore show that there was an ample supply of water at that point and would not necessarily be evidence of any waste of water. In fact, the testimony indicates that the tules appear at a point where the waste water from another project entered the valley.¹⁹⁵

Open canals, old river beds and other water courses were used in 1908 when the agreement was made. They were used in 1925 when the State adjudication took place.

¹⁹³ Appellant's Brief 58.

¹⁹⁴ R. 472.

¹⁹⁵ R. 454.

They are all on the north side of the stream and below the measuring point at the Narrows. The use of such methods, which we do not agree are wasteful, might be objected to by someone who was sharing in the 75% of Ahtanum Creek under the Decree of Adjudication. Appellant's criticism of the use made of the 75% of the flow does not warrant taking away the water from the appellees. Appellant cannot establish title to property by being critical of the way appellees use it.

The claim of waste is directly contradicted by the testimony of the witnesses for the appellees.¹⁹⁶ Likewise there is evidence of the use of wells to supplement the waters in the stream during the low water period.¹⁹⁷

FEDERAL LAND BANK AND ITS INTERESTS

The appellee, the Federal Land Bank of Spokane hereby adopts and asserts the arguments advanced herein on behalf of the appellees, Ahtanum Irrigation District. The Land Bank has taken numerous mortgages on farms and ranches in the Ahtanum Valley¹⁹⁸ and a successful maintenance of the appellant's claim would obviously jeopardize the security of the appellee, Land Bank's mortgages. These mortgages were negotiated and granted in the utmost of good faith, relying upon the established water rights of the mortgagors, recorded in the first in-

¹⁹⁶ Ray West, R. 493; K. P. Bates, R. 497; J. R. Rutherford, R. 502, 503, and Mr. Shockley, R. 509.

¹⁹⁷ R. 527-531.

¹⁹⁸ Defendant's Exhibit No. 143.

stance under the 1908 Agreement and later particularized under the Achepohl Decree adjudicating Ahtanum Creek.¹⁹⁹ Again equitable principles require affirmance of the lower court's decision to protect the interests of this third party that acted in reliance on these established water rights.

CONCLUSION

It is respectfully urged for the above and foregoing reasons, the judgment and decree of the trial court should be affirmed and the validity of the 1903 Agreement upheld. That further this Honorable Court should issue its injunction as prayed for herein²⁰⁰ implementing the decree of the trial court.

FRED C. PALMER

CHARLES L. POWELL

J. W. McARDLE

Attorneys for Appellee,
Ahtanum Irrigation District

E. C. PRESTBYE

Attorney for Appellee,
Federal Land Bank of Spokane

¹⁹⁹ In re Ahtanum Creek, 139 W. 84, 245 P. 753.

²⁰⁰ Infra Page 62 this brief.

IN THE UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT
201

UNITED STATES OF AMERICA,	<i>Appellant</i>	}	No. 14714
<i>vs.</i>			
AHTANUM IRRIGATION DISTRICT, et al.,	<i>Appellees.</i>	}	Motion for Injunction Pending Appeal

COMES NOW the AHTANUM IRRIGATION DISTRICT, one of the appellees in the above entitled proceeding, in behalf of all appellees, acting by and through its attorneys, Fred C. Palmer, Charles L. Powell, and J. W. McArdle, and respectfully moves this Honorable Court for an injunction pending the appeal of this case and until the revesting of the District Court with jurisdiction by the return of the mandate to that Court, said injunction to be for the purpose of maintaining the status quo of the parties and to remove the danger and threatened danger of irreparable injury to the appellees. This motion is made pursuant to Federal Rules of Civil Procedure, Rule 62 (g).

²⁰¹ The appellees filed a motion for injunction pending appeal. It was before the Court in Seattle, Washington, on January 9, 1956, but taken from the calendar to be renewed and heard with the main argument in this case. Motion and argument are reprinted herein. The affidavits, including report of the Water Master for Yakima County for 1955 appear in Appendix "C," Page 73 et. seq.

1. The Ahtanum Irrigation District is organized under State law and all property and rights are held and exercised by it as a public trust for the use and benefit of the landowners in the district.

2. That this cause is presently on appeal and this motion for injunction pending appeal is made based upon said record, and the whole thereof, and particularly the Findings of Fact and Conclusions of Law²⁰² and the Judgment of Dismissal²⁰³ which are by reference incorporated in this motion and made a part hereof.

3. That the Trial Court, the Honorable James Alger Fee, United States Circuit Judge, found and determined that a certain contract of 1908 was a valid agreement²⁰⁴ and that an adjudication was made in 1926 adjudicating all claims to 75% of the flow of Ahtanum Creek²⁰⁵ and that the United States of America, appellant in this cause, has only the right to divert from Ahtanum Creek 25% of the flow thereof.

4. During the irrigation season of 1955 diversions were made by the appellant in excess of 25% of the flow of the stream and unless appellant is enjoined, diversion in excess of 25% of the flow of the stream will be made in 1956.

5. That such excess diversion will result in irre-

²⁰² R. 159.

²⁰³ R. 166.

²⁰⁴ R. 162.

²⁰⁵ R. 163, 165.

parable damage and injury to the appellees who are farming the property involved and have been adjudicated to be the owners of 75% of the flow of Ahtanum Creek.

6. Affidavits appearing as Appendix A and B attached,²⁰⁶ are filed in support of this motion.

WHEREFORE, this appellee prays that this Honorable Court grant an injunction pending the appeal of this cause, maintaining the status quo of the respective parties in the flow of Ahtanum Creek at the amount determined and adjudicated, to-wit, 25% to the appellant and 75% to the appellees, or, in the alternative, that this Honorable Court solely for the purpose of granting such injunction, authorize and direct a hearing on this matter by the United States District Court, for the Eastern District of Washington, Southern Division, to determine the question of the necessity for the issuance of said injunction pending the appeal of this cause.

/s/ FRED C. PALMER

/s/ CHARLES L. POWELL

/s/ J. W. McARDLE

Attorneys for Appellee
Ahtanum Irrigation District

506 Miller Building
Yakima, Washington

²⁰⁶ Appendix C in this brief.

IN THE UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant

vs.

AHTANUM IRRIGATION DISTRICT,
et al.,

Appellees.

No. 14714

MEMORANDUM IN SUPPORT OF MOTION
FOR INJUNCTION

This Honorable Court has jurisdiction to entertain this motion for injunction.

Federal Rules of Civil Procedure, Rule 62 (g):

“(g) Power of Appellate Court not Limited. The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.”

The Appellate Court has jurisdiction and authority to grant a stay to maintain status quo.

Breswick & Co. v. U. S., 75 S. Ct. 912; 100 L. Ed. (advance P. 36).

While the Court is recognized to have the power, injunction will not issue if administrative remedies offer ample protection to the appellants' rights and until those remedies are exhausted.

Twentieth Century Airlines vs. Ryan, (1953) 74 S. Ct. 8, 11; 98 Law Ed. 1143.

In this case there is no administrative procedure available to the appellees. The District Court entered a judgment on Findings of Fact and Conclusions of Law which determined that the plaintiff's rights had been lost by contract, by laches, by a State adjudication and by failure to prove the appurtenance of the water claimed.²⁰⁷

See opinion in *U. S. v. Ahtanum Irrigation District*, 124 F. Supp. 818.

Where the question is whether an injunction should be granted the irreparable injury facing the parties must be balanced against competing equities before an injunction will issue.

Yakus v. U. S. (1944) 321 U. S. 414, 64 S. Ct. 660, 674, 675.

Public Utilities Commission vs. Capital Transit Co., 214 F. 2d. 242, 245. (D. C. Cir. 1954).

The Court of Appeals may by its order remand the proceedings to the District Court for determination of equities and irreparable injury and for the granting of injunction.

U. S. v. El-O-Pathic Pharmacy, (9th Cir. 1951), 192 F. 2d 62, 79.

An injunction should issue pending appeal in order

²⁰⁷ R. 159, 167.

to preserve the fruits of the litigation and to further the interests of justice.

Plomb Tool Co. vs. Fayette R. Plumb, Inc. (9th Cir. 1949), 171 F. 2d. 945, 946.

CONCLUSION

The appellees respectfully request that this Honorable Court order the issuance of an injunction directed to the appellant pending the appeal of this case preserving the status quo, maintaining the parties and their property rights in their position as occupied at the time the judgment was entered, and that in the interests of justice and to preserve the fruits of the appeal for the appellees that the United States of America be restrained and enjoined as herein requested by order issued out of this Court, or in the alternative that this Court cause the same to be heard by the District Court and reviewed and determined by appropriate order therein.

Respectfully submitted,

/s/ FRED C. PALMER

/s/ CHARLES L. POWELL

/s/ J. W. McARDLE

*Attorneys for Ahtanum Irrigation
District, Appellee*

APPENDIX A

THIS MEMORANDUM AGREEMENT, Made this Ninth day of May, 1908, by and between the United States of America, and its assigns, acting in this behalf by W. H. Code, Chief Engineer of Irrigation Indian Bureau, thereunto duly authorized by the Secretary of the Interior, party of the first part, and W. W. Glidden, et al users of water from the Ahtanum Creek on lands located north of and adjacent to the Yakima Indian Reservation, in Yakima County, State of Washington, their heirs, administrators, executors and assigns, acting in this behalf by D. E. Lesh, A. D. Eglin, J. J. Wiley, D. B. Greenwalt, William H. Moyer, C. P. Swain, and H. D. Winchester, their duly appointed and constituted attorneys, party of the second part, WITNESSETH,

THAT WHEREAS the parties hereto claim certain quantities of water in the Ahtanum Creek, County of Yakima, State of Washington, and a right to divert the same for irrigation purposes; and

WHEREAS, a dispute exists as to the extent of the respective rights of the said parties in and to said water.

Now, THEREFORE. the parties hereto, in order to avoid litigation and in order to limit and define their said respective rights in and to the waters of the said Ahtanum Creek, do mutually covenant and agree as follows:

ARTICLE 1. The party of the first part agrees to limit and define its claim to the waters of Ahtanum Creek and its tributaries as twenty-five per cent (25%) of the natural flow of said Creek, and the party of the second part agrees to limit and define its total and aggregate claim to the said waters as seventy-five per cent (75%) of the said natural flow of said stream, each party hereto surrendering and conceding to the

other party all rights heretofore claimed in the said waters in excess of the amounts herein named.

ARTICLE 2. It is understood and agreed that the Secretary of the Interior may appoint a competent hydrographer to measure the water in said Ahtanum Creek and to determine the amount thereof to which the party of the first part is entitled, at any and all times, by virtue of his agreement.

ARTICLE 3. It is further understood and agreed that the waters flowing in said Ahtanum Creek shall be measured at a point on said stream locally known as The Narrows, located about one-fourth of a mile west of the point of intersection of said stream with the west line of Section 14, Township 12 North, Range 16, E.W.M. in said County and State. To the amount thus ascertained to be in said stream at said point shall be added the amounts of water diverted from said Ahtanum Creek, including its North and South Forks, so-called, above said point of measurement. The total amount of water thus ascertained shall be deemed the natural flow of Ahtanum Creek and the party of the first part shall receive twenty-five per cent (25%) thereof as the amount of said waters to which it is entitled by virtue of this agreement, for use on its lands south of said stream; provided, however, that if it appears at any time that there is an appreciable seepage or return flow to the main channel of said stream below said point of measurement, then such seepage or return flow shall be divided between the parties hereto in the same proportion as herein provided for the division of the natural flow of said stream.

ARTICLE 4. It is further understood and agreed that the parties hereto may divert the low water flow, or any part thereof, of said stream, to which they are entitled under the provisions of this agreement, in main canals from any point or points on their respective sides of said stream below the point of measure-

ment hereinbefore located and locally known as The Narrows. If, however, it should be determined in the future by either party hereto, to construct a main canal with its heading at any point between said Narrows and the junction of the north and south channels of said stream, located in Section 13, Township 12 North, Range 16 East W. M., the other party hereto shall have the election to join in the construction of that portion of said canal above the junction of the north and south channels aforesaid, which said portion shall be constructed with a capacity sufficient and shall serve to carry the total amount of water diverted by both parties. The cost of the construction of such portion of said canal as may be so jointly constructed shall be borne by the first and second parties in proportions of one-fourth and three-fourths respectively, and the cost of maintenance and repair of the same shall be borne in like proportions. In case such canal shall be located on the south side of said stream, the party of the first part will furnish a right of way therefor between the points named. If, however, said canal should be located on the north side of said stream, the right of way therefor between the points named, shall be furnished by the party of the second part.

ARTICLE 5. It is further understood and agreed that wherever water is diverted from the main channel of Ahtanum Creek by one or more of the water users hereinbefore referred to, or by the party of the first part, a substantial headgate shall be installed and maintained by said water user or water users or by the party of the first part, as the case may be, which headgate shall be of such construction that it can be adjusted and locked by the ditch master hereinafter provided for, and such water user or water users and the said party of the first part shall install and maintain as near as practicable to such headgate a suitable measuring device which shall be a cipoletti weir where practicable.

For the purpose of the division of the waters of the

Ahtanum Creek as herein provided for, each of the said parties hereby agrees to appoint on or before the fifteenth day of June of each and every year, a ditch master, whose duty it shall be to so close, regulate, or adjust the headgates of the party so appointing him that no more water will be diverted from said Ahtanum Creek by the parties hereto than said parties are respectively entitled to under the provisions of this agreement, and the ditch masters thus appointed are hereby clothed with all necessary authority to do and perform any and all acts necessary to the proper division of said water, and to that end shall receive orders and instructions from the hydrographer appointed by the Secretary of the Interior as to the amounts to which each of the parties hereto is entitled from time to time; provided, however, that nothing contained in this Article shall be construed as settling the rights of the various water users as to their respective rights to the use of water herein conceded to said second party.

ARTICLE 6. It is further understood and agreed that the water herein divided between the parties hereto may be used for domestic, power, stock, and irrigation purposes.

ARTICLE 7. No Member of or Delegate to Congress, officer, agent or employee of the Government is or shall be admitted to any share or part of this contract, or to any benefit which may arise therefrom, and sections 3739, 3740, 3741, and 3742 of the Revised Statutes of the United States, so far as same may be applicable, are part of this contract.

IN WITNESS WHEREOF, the parties have hereto signed their names the day and year first above written.

W. H. CODE

Chief Engineer of Irrigation Indian Bureau,
For and on behalf of the United States of
America, Party of the first part.

W. W. GLIDDEN, et al

D. E. LESH
 A. D. EGLIN
 J. J. WILEY
 D. B. GREENWALT
 WILLIAM H. MOYER
 C. F. SWAIN
 H. D. WINCHESTER
 Their Attorneys in fact, Party of the second
 part.

STATE OF WASHINGTON:

County of Yakima

ss.

I, John H. Lynch, a Notary Public in and for said County and State, do hereby certify that personally appeared before me D. E. Lesh, A. D. Eglin, J. J. Wiley, D. B. Greenwalt, William H. Moyer, C. F. Swain, and H. D. Winchester, personally known to me to be the individuals who executed the withinhand foregoing instrument of writing as Attorneys in fact for and on behalf of W. W. Glidden, et al. The principal names in said instrument, and each for himself and not one for the other, acknowledged to me that he executed the same as the free and voluntary act and deed of the said principals and each of them for the uses and purposes therein mentioned.

IN WITNESS WHEREOF I have hereunto subscribed my name and affixed my official seal this ninth day of May, 1908.

(Sgd) JOHN H. LYNCH

Notary Public in and for the State of Washington, residing at North Yakima, Washington

SEAL

Approved this 30th day of June, 1908.

FRANK PIERCE

First Assistant Secretary of the Interior

APPENDIX B

Plaintiff's Exhibit No. 11-113 — Exhibit "I"

DEPARTMENT OF JUSTICE
OFFICE OF UNITED STATES ATTORNEY
for the
Eastern District of Washington
Spokane

May 11, 1907

H. J. Snively, Esq.

Attorney at Law,

North Yakima, Wash.

Sir:

I am in receipt of yours of the 4th inst. containing copy of third amended complaint in the case of Munn against Redman, and others. It has occurred to me that if it is desired to settle the Government's rights in Ahtanum Creek, it would be a better plan to bring the case in the federal court, or permit me to get permission to bring a case on behalf of the Government. Whatever the result of this action may be, the rights of the Government and a large number of other defendants leasing Indian lands will not be, I believe, determined. If you should prevail in this litigation, I cannot see than my client, Mr. Redman, will be affected, because all that he does, as I understand it, with the water of Ahtanum Creek is done for and on behalf of the United States. While I am speaking without any authority, I have no doubt that it would be well to settle the rights of the people and the Government to the waters of the creek, but inasmuch as

the case involves so much, and so many people, I think that the decision ought to conclude everyone, but as stated before, it does not seem to me that it will be done in this action, for the Government does not appear in a state court. If it should seem to you that there is anything in my suggestions that is entitled to further consideration, I shall be glad to take the matter up with you. I am satisfied that neither desires to have two big law suits where one will do as well.

I am sending you herewith a demurrer to the amended complaint, on behalf of the defendant Redman. Please acknowledge receipt.

Respectfully,

Enc.

A. G. AVERY

Plaintiff's Exhibit 11-113 — Exhibit "J"

Law Offices of
H. J. SNIVELY

North Yakima, Washington
May 18, 1907

Hon. A. G. Avery,
U. S. District Attorney
Spokane, Washington.

Dear Sir:

Your favor of May 11th has been received relating to the Munn-Redman case, and its contents have been carefully noted. I have deferred from answering the same

until I could have a conference with my clients, which I had upon yesterday.

I will agree to dismiss the present case as far as Mr. Redman is concerned providing you immediately file a bill in behalf of the United States to determine the questions involved and agree that the same may be heard at the coming June term of Court at North Yakima. There will be nothing but a question of law involved in this case. The United States for the past three months have had a corp of surveyors surveying out and locating the ditches taken out on the north side of the creek and are platting the same, with a view as I understand it, of using the same in this suit. There will not be the slightest difficulty about us agreeing to the facts in the case, and consequently there need be no testimony taken at all, but the question of law alone, as I view the case, will determine. It is very necessary that this be done immediately for many reasons. One of the most important of which is this: If the United States were to prevail in this suit to the extent that the claim is made in behalf of the Indians there could not be a drop of the Ahtanum waters used upon any lands for the purpose of irrigation, not even, the Indian lands. If this is the law, it should be determined before the Government Tieton Irrigation Project has gone so far that the ditch could not be enlarged to carry water sufficient to irrigate the whole Ahtanum Valley, including the portion of it within the Indian Reservation, as this would be the only hope in the event re-

ferred to, of irrigating this land and in this connection as you are not acquainted with this country I wish to say: That the lands on the north side of the Ahtanum Creek have been irrigated beginning in 1867 down to the present time from the waters of Ahtanum Creek and it is safe to say that the value of the farms and improvements on the north side of the Ahtanum at the present time will exceed a half million dollars, including valuable orchards, hop yards, meadows, many handsome dwellings, school houses, etc. I had always hoped and still hope that the Indian Department will see its way clear to provide for the irrigation of those Indian lands, none of which have been cultivated until within the last few years, from the Tieton Ditch. In 1889 a suit was brought by the appropriators of water from the Ahtanum Creek to settle the rights thereof among the persons owning lands on the north side of the creek and after expensive litigation a decree was entered. It being the decree known as the decree in the case of Benton v. Johncox, which was appealed to the Supreme Court of the State of Washington, and there affirmed. Reported in 17 Washington, page 277. I am now engaged in enforcing that decree and have been for some six months past. This decree was of course supposed to settle the water rights on the entire Ahtanum. At the time the suit was begun and decided no water was being taken out on the Reservation.

I have at great length presented this matter to you

with the hope of through your good offices having this matter presented to the Indian Department in such a way that a speedy determination of this question along such lines that will subserve the interests of all parties will be speedily obtained. I remain,

Yours very truly,

H. J. Snively

Plaintiff's Exhibit No. 11-113 — Exhibit "K"

DEPARTMENT OF JUSTICE
OFFICE OF UNITED STATES ATTORNEY
for the
EASTERN DISTRICT OF WASHINGTON
Spokane.

May 21, 1907

H. J. Snively, Esq.

North Yakima, Wash.

Dear Sir:

I have yours of the 18th inst. in the matter of Munn against Redman, and others, and note that you say therein you will dismiss the case as to Redman if I will immediately file a bill in behalf of the United States to determine the questions involved so that it can be disposed of at the coming term at North Yakima. I cannot file a bill of that character without the approval of the Department of Justice, and I doubt if such approval could be secured in time to dispose of the matter at the next Yakima term which will be in a little over two weeks. Everything would depend upon the promptness with which

the matter would be disposed of in Washington, but I feel confident that the authority could not be secured in so short a time. It seems to me that inasmuch as no jury will be required, it is not imperative that the case should be disposed of while Judge Whitson is at North Yakima on the 11th of June. It will be such a case as he can take up at any time.

If you do not see fit to dismiss Mr. Redman, I am glad that you say there will not be any difficulty about agreeing as to the facts, and that no testimony need be taken at all, and that according to your view a question of law alone remains to be determined. That will expedite matters materially as to the merits if it becomes necessary to consider them. I doubt very much that there is any jurisdiction in the court to try the case as to Redman, the reservation lands, or allotments.

Respectfully,

A. G. AVERY

Plaintiff's Exhibit No. 11-14

DEPARTMENT OF JUSTICE
Carbon Copy for the Files

87866

GM

A. G. Avery, Esq.,

July 30, 1907

United States Attorney,

Spokane, Washington

Sir:

Herewith is returned to you, duly signed, the original

bill in equity having for its object the settlement of the use of the waters of Attah-num Creek, Washington.

The Department concurs in the scope and form of the bill. When you shall have ascertained the names of the defendants please send them to the Department so that the copy of the bill which it has retained may be made complete.

Respectfully,

Attorney-General

Inclo. 18452.

Plaintiff's Exhibit No. 11-17

DEPARTMENT OF JUSTICE

Carbon Copy for the Files

August 12, 1907

87,866

United States Attorney,
Spokane,
Washington.

Unless statute of limitations or some other question prevents, do not file bill in equity in Ahtanum Creek matter until further notice.

(Sub Delay)

124838
87866 FILE

Plaintiff's Exhibit No. 11-6

DEPARTMENT OF THE INTERIOR
Chief Engineer, Indian Service,
(Irrigation)

522 Bumiller Bldg.
Los Angeles, Cal.
Oct. 17, 1907

The Secretary of the Interior,
Washington, D. C.
Sir:

In company with Mr. Jas. F. Allen, of the Indian Office, I recently visited the Yakima Reservation, Washington, to inspect work performed on canal extensions during the fiscal year 1907, finding the same to be very satisfactory, although limited in extent, owing to the small appropriation expended, viz: \$15,000.

In accordance with your instructions, as verbally given, an investigation was made of conditions along the Ahtanum Creek, a reservation boundary stream, apropos of the contemplated suit brought by the Department of Justice on behalf of the Indians against the white settlers diverting water therefrom.

I have been informed that action on this suit has been postponed by the U. S. District Attorney, on advice from Washington, with a view, presumably, of allowing the litigants time in which to effect a compromise, if possible, in which event further litigation would be unnecessary.

GENERAL DATA RELATIVE TO AHTANUM VALLEY.

The results of Engineer Noble's investigation show the respective areas farmed in 1907 in the Ahtanum Valley to be as follows:

Indian lands on south side of Creek.....	1500	acres
Total capacity of Indian Ditches.....	25	Sec. feet
Total number of Indian Ditches.....	12	
White holdings irrigated, not including some additional bench lands irrigated during flood periods.....	5500	acres
Total capacity of ditches (Whites)....	273.6	Sec. feet
Total number of ditches (Whites).....	166	
Capacity of ditches (whites) for which no acreage is tabulated by Noble.....	68.86	sec. ft.

* * * * *

NATURE OF COMPROMISE RECOMMENDED.

As a result of our investigations and conferences the only character of a compromise agreement that seemed feasible was a division of the waters of Ahtanum Creek based upon the relative areas actually irrigated, by the Indians on the south side, and the white settlers on the north, to which latter has been previously adjudicated the entire low water flow of the creek. It would not be necessary to attempt any compromise with the remaining white settlers, owning simply high water rights in the creek, since there are no disputes over such rights.

Engineer Noble's table not showing the acreage farmed under every canal on the north side, I wired Engineer Redman, asking that he have Mr. Noble submit an esti-

mate of the lands irrigated on each side of the creek, receiving in answer the following:

N. Yakima, Wn. Oct. 11, 07

“Indian side irrigated 1500 acres. White side 5500 acres. Some more partially irrigated high land white side during high water periods, Nobles figures.
Redman.”

A subsequent telegram received on October 15th. from Mr. Redman is as follows:

“My personal examination finds 1680 acres Indian land irrigated from Ahtanum Creek. Close estimate.
Redman.”

From the above data the Indians are irrigating between one third and one quarter of the amount irrigated by the whites, and I would recommend therefore that an attempt be made to adjust this matter out of court upon the basis that during the low water period of the Ahtanum Creek one third of the supply be apportioned to the Indians, and two thirds to the white settlers now claiming rights to said flow. This division is a little in favor of the Indians upon the basis of respective areas irrigated, as one quarter of the flow would apparently be nearer the mark, but it would be well to place the amount at one third, since it is probable that no more strenuous objections will be offered than if a smaller proportion were suggested.

If, during the progress of negotiations, matters so shape themselves that no basis of compromise will be

entertained by the white settlers who hold prior rights, other than a division of the waters based upon the exact acreage now irrigated on the respective sides, I would recommend the acceptance of such terms by the Indian office, rather than to continue litigation, the relative areas irrigated to be determined and agreed upon by an engineer of the Indian Service and one appointed by the Ahtanum Water users. These men to have the privilege of calling in a third engineer, in case of dispute.

The Reclamation Engineers in charge of the Yakima Project are very anxious that litigation may be avoided on the Ahtanum, fearing that a start made in this direction might ultimately spread to the Yakima Valley, and involve the country in a sea of litigation which might stop all Reclamation work. They, and the capable young Government Attorney, Mr. Williamson, will lend the Indian Office all the assistance possible in any negotiations undertaken. It will not be an easy task at best, and will probably be an impossible one, unless Attorney Sniveley fully appreciates that, in view of the recent Montana decisions, especially that of the United States vs. Conrad Investment Co., the Department is offering very fair terms.

He should realize that if litigation is continued there would be a possibility of his clients in the Ahtanum Valley being wholly dispossessed of their water rights during the low water period, which would mean the ruination of one of the earliest settlements in the Yakima district.

The Department is the best judge of how far it would be advisable to use the power which would be given it, in event that the Montana decisions were sustained by the U. S. Supreme Court. To a layman, it seems that, as between the early white settler, who has made prior and beneficial use of the waters of a boundary stream, and the Government, which, as guardian of the Indians' water rights, had not done so, the latter would be the party to make restitution to the Indians.

In making an effort, however, to effect a reasonable compromise, though it be unsuccessful, the Department will have shown a disposition to treat the pioneer water users of the valley fairly, and if they reject such overtures, they will have less cause for complaint in the future, should litigation be continued, and the case go against them.

Very respectfully,

/s/ W. C. CODE

L.S.

Chief Engineer.

Copy to Director Rec. Service.

SECRETARY'S OFFICE
DEPARTMENT OF THE INTERIOR
WASHINGTON, D. C.

JIP-K

October 24, 1907

Sir:

I am handing you herewith a report from Chief Engineer Code, dated the 17th instant, in relation to irriga-

tion matters in the Yakima Reservation, and bearing especially upon the dispute existing between the present users of water on the north side of Ahtanum Creek and the Government on behalf of the Reservation.

I would be glad if you would convey to me at the earliest practicable date, with such recommendations as you may deem advisable, your views concerning the suggestions made by Inspector Code relative to said matter.

Very respectfully,

/s/ JAMES RUDOLPH GARFIELD
Secretary.

The Commissioner of Indian Affairs.

Encl. 348

Plaintiff's Exhibit No. 11-18

DEPARTMENT OF THE INTERIOR
OFFICE OF INDIAN AFFAIRS
Washington

Refer in Reply
to the following:

October 28, 1907

Field Work
85193-1907

Subject: Dispute between
Indians of Yakima Reservation and settlers on the
north side of Ahtanum Creek.

Superintendent in Charge,

Yakima Agency,

Fort Simcoe, Washington.

Sir:

In a report, dated October 17, relative to irrigation matters on the Yakima Reservation and especially as to the dispute with the water users on the north side of Ahtanum Creek, Chief Engineer Code recommended that an attempt be made to adjust the matter out of court upon the basis that during the low water period of Ahtanum Creek one third of the supply be apportioned to the Indians and two thirds to the white settlers now claiming rights to said flow.

This recommendation has been approved by the Department and you are instructed to confer with Supervising Engineer Henny, of the Reclamation Service, and arrange with him to meet in conference with Attorney Snively, who, it is understood, represents the settlers, in order to ascertain the feasibility of effecting a compromise along the line suggested, and, if possible, to obtain the written consent of the settlers in interest.

In the event of failure of negotiations on this basis, the Department would be willing to accept a division based on the exact acreage now irrigated on the respective sides of the creek, the areas to be determined and agreed upon by an Engineer of the Indian Service and one selected by the Ahtanum water users, these two to have the privilege of calling in a third engineer in case of dispute.

This basis however should not be offered or accepted until the one-third and two-thirds divisions has been ab-

solutely rejected. Mr. Code says that the Reclamation Engineers in charge of the Yakima project are very anxious that litigation on the Ahtanum shall be avoided, and with the attorney of that Service, Mr. Williamson, will lend the Indian Office all the assistance possible in any negotiations that may be undertaken.

I desire you to take this matter up in connection with the Reclamation Service along the lines suggested as early as practicable and to spare no effort to effect the compromise.

If it should develop that the presence of Mr. Code would be of material assistance in connection with the negotiations you will so advise the Office by telegram that the necessary orders may be given him without delay.

For your further information I enclose a copy of his report.

He has been requested to submit an estimate of the cost of sinking wells to test the possibility of increasing the water supply by developing the underground waters.

Very respectfully,

(Copy) F. E. LEUPP

JFA-CJI

Commissioner.

Plaintiff's Exhibit No. 11-19

Dispute between Indians on Yakima Reservation
and settlers on the North side of Ahtanum
Creek.

JL-PLH.

North Yakima, Wash., January 9, 1908

Mr. A. G. Avery,
United States Attorney,
Spokane, Wash.

Dear Sir:

I enclose copy of a letter received from the Department some time ago in reference to submitting a proposition to the water users of Ahtanum Creek to settle the question of water rights in said creek out of Court. Also copy of Mr. Code's report in reference to the matter which possibly may be of some use to you, and which explains conditions as he views them. On the strength of this report the proposition of settlement was made. . . .

I have conferred with Mr. Snively and other lawyers interested and they desire first to have the attorneys meet together and discuss whether to advise their clients to accept such a proposition or not. They say they would very much like to have you with them at this meeting when it is held, (I suppose with the idea that you present the claims of the Government, or the claims of the Indians to the water of Ahtanum Creek.)

The Reclamation people are interested and will do all they can to assist in bringing about a settlement and

Mr. Williamson, as well as the attorneys for the water users, are very anxious to have you with us at this meeting, for we believe you can very greatly assist us in arriving at a settlement and we therefore ask you to consent to be present at this conference. . . .

Respectfully yours,

Encs. 2.

Supt. & S. D. A.

Plaintiff's Exhibit No. 11-113 — Exhibit "L"

SECRETARY'S OFFICE
DEPARTMENT OF THE INTERIOR
Washington, D. C.

January 29, 1908

Dear Sir:

I have been considering the question of the use of the water of Ahtanum Creek upon the Indian Lands, and the claims of the white settlers on the opposite side of the Creek.

It is clear to me that the time has come for a final settlement of these adverse claims, but I am advised that the settlers have not an organization which represents all their different interests. If the settlers will appoint a

committee and clothe it with full power to act for all the different interests, I will be in a position to immediately confer with the committee and effect a final settlement of the different rights. Unless such a committee be immediately formed and clothed with the requisite power, it will be necessary for me, as representing the Indians, to begin an action in court to determine definitely their rights.

It is surely to the best interests of all concerned that this matter be settled by agreement rather than as a result of litigation. The settlers will find, as I told them last summer, that the Indian Office desires to meet them half way in effecting a fair settlement. but, as you will readily understand, it is quite impossible for the Government to attempt to deal individually with these settlers. Any agreement made with one would necessarily be without binding effect upon any of the others. In order to make a definite proposition, will you please say to the representatives of all the interests that unless the committee is organized in the manner I have indicated on or before March 15th, it will be necessary for me to immediately take up the question of a bill in equity.

In this connection, you may say to all the persons interested that they must place no dependence whatever upon water being furnished to them from the Tieton Canal. I am convinced by the reports of the engineers of the Reclamation Service that it would be most unwise to make

even a suggestion, much less a promise, that water may be furnished from that source to lands at present irrigated from Ahtanum Canal.

Very truly yours,

JAMES RUDOLPH GARFIELD

Secretary

Mr. H. J. Snively
North Yakima, Wash.

Plaintiff's Exhibit No. 11-21

DEPARTMENT OF THE INTERIOR
United States Indian Service

Yakima Indian Agency,
Ft. Simcoe, Washington
April 9, 1908

Subject:
Dispute between Yakima
Indians and white settlers
as to water of Ahtanum Creek.

Honorable Commisioner of Indian Affairs,
Washington, D. C.

Sir:

Referring to previous correspondence of your Office under date, Oct. 28, 1907, "Field Work, 85193," and letter of Jany 2nd, 1908, in reference to securing settlement of the division of the water of Ahtanum Creek, will state that some time since I reported to your Office that the water users of said creek held a meeting and appointed

a committee to act for them, etc. And this committee now reports to me as follows:

North Yakima, Wash.
April 8, 1908

“Mr. J. Lynch,
Supt. and Disbursing Agent,
Yakima Indian Reservation,
Ft. Simcoe, Wash.

Dear Sir:

The committee selected to adjust the water claims of the water users along the Ahtanum, with the Yakima Indians, have been working very diligently to get all the signatures of the claimants to the Power of Attorney to the Committee of Adjustment. But, owing to the absence of a few of the claimants, we have as yet failed to get quite all of the signatures.

However, we now think that by the time an agent can reach here to represent the Government and the Indians, we shall have secured the signatures.

Yours respectfully,

(signed by) THE COMMITTEE.”

In view of the representations made by this committee; and to my personal knowledge, they have secured practically all of the water users signatures granting this committee authority to act for them, I would request that Mr. Code be directed to come here, at once, to confer with this committee and enter into an agreement with them, under such instructions as your Office may deem advisable to give him.

If it is not practical to have Mr. Code come, some other representative of the Department might do, but as

Mr. Code is familiar with all the conditions, I hope he can be designated as the agent of the Department to act with the committee in this matter.

Very respectfully,
/S/ JAY LYNCH
Supt. & S. D. A.

JL—a

Plaintiff's Exhibit No. 11-23

Field Work
24714-1908

JFA
Subject: Compromise with
Ahtanum Creek water users.

April 13, 1908

W. H. Code. Esq.,

Chief Engineer,

Yakima Agency,

Fort Simcoe, Washington.

Sir:

Referring to your report of October 17, 1907, relative to irrigation matters on the Yakima Reservation, especially in regard to conditions along Ahtanum Creek, and the letter of the Commissioner of Indian Affairs, dated October 28, enclosing a copy of the instructions given Superintendent Lynch, on January 29 I advised J. H. Snively, attorney for a number of the settlers, that if they would appoint a committee and clothe it with full power to act for all the different interests, I would be in a position to immed-

imately confer with the committee and effect a final settlement of the different rights.

Also, I asked him to say to the representatives of all the interests that unless the committee was organized in the manner I had indicated on or before March 15, it would be necessary for me to immediately take up the question of a bill in equity.

On March 5 Superintendent Lynch reported that at a meeting of practically all the persons interested, at which the sentiment appeared to be practically unanimous to settle the matter out of court, a committee was selected, but that it was deemed necessary and advisable that a power of attorney be signed by all the water users giving the committee full power to enter into an agreement.

Mr. Lynch said it would require some little time to procure the signatures to this instrument but thought it could be completed by the first of April.

He said also that it was the sense of the meeting that when the power of attorney had been signed, that I appoint some person to confer with the committee and enter into an agreement in writing.

He suggested you as the proper person for this purpose.

On March 14 Superintendent Lynch was advised by the Indian Office that on March 13 the Department had

extended the time within which the committee must organize, with full power to act, from March 15 to April 10.

On April 11 he telegraphed the Commissioner of Indian Affairs:

“Referring yours March fourteenth reference settlement waters of Ahtanum Creek committee reports that by time agent of Department can reach here they will have secured the signatures granting committee power to act. I recommend Mr. Code be sent here soon as possible with instructions forwarded him here.”

On the 13th I telegraphed you:

“Proceed immediately to Yakima Agency and take up with Superintendent Lynch Ahtanum Creek matter. Letter will be mailed you at Fort Simcoe.”

If the signatures are secured as indicated in Mr. Lynch’s telegram, this will be accepted as a substantial compliance with my letter of January 29 as modified on March 13.

You will please take up the matter with Superintendent Lynch and the settlers interested along the lines indicated in your report of October 17 and endeavor to secure an agreement by which two-thirds of the waters of Ahtanum Creek during the low water period shall be apportioned to the settlers claiming rights to the low water flow, and one third to the Indians.

In the event of failure to secure an agreement on this basis you are authorized to sign an agreement for a

division of the low water flow based on the exact acreage now irrigated on the respective sides of the creek, but the one-third and two-thirds basis must first be pressed to the limit, and the alternative accepted only when it is certain that an agreement to the first proposition cannot be obtained.

— If you think it necessary or advisable you will consult the local officers of the Reclamation Service, who will doubtless be pleased to give you any assistance in their power.

Respectfully,

/s/ JAMES RUDOLPH GARFIELD

CJI

Secretary.

Plaintiff's Exhibit No. 11-25

JIP-M SECRETARY'S OFFICE
DEPARTMENT OF THE INTERIOR
WASHINGTON, D. C.

May 4, 1908

Sir:

I am handing you herewith a report from Chief Engineer Code, dated North Yakima, Washington, April 28, 1908, with its enclosure and map in separate tube, relative to the Ahtanum Water situation. Kindly advise me of your views concerning the agreement transmitted herewith which has been submitted for my approval, together

with any suggestions you may desire to make. Return papers with your reply.

Very respectfully,

/s/ James Rudolph Garfield
Secretary.

The Commissioner of Indian Affairs.
Encs. No. 1036.

Plaintiff's Exhibit No. 11-26

Refer in Reply to the following:

Field Work
30200-1908

JFA

Subject: Proposed Agreement with
water users of Ahtanum Valley.

DEPARTMENT OF THE INTERIOR
OFFICE OF INDIAN AFFAIRS
WASHINGTON

May 5, 1908

The Honorable,

The Secretary of the Interior.

Sir:

The Office has received your letter of the 4th transmitting a report from Chief Engineer Code, with enclosures and map, relative to the Ahtanum Creek water situation, and requesting my views concerning the form of agreement submitted for your approval, together with any suggestions I may desire to make.

In response, the proposed agreement has been carefully examined.

It appears to cover the situation and to safeguard the interests of all concerned upon the basis authorized in your telegram of April 24 to Mr. Code.

I have the honor to recommend that it receive your approval and that Mr. Code be so advised by wire.

A telegram for your signature is herewith transmitted.

Very respectfully,

CJI

/s/ C. F. Larrabee

Acting Commissioner

Telegram.

Code,

May 5, 1908

Chief Engineer

North Yakima, Washington

Your letter April twenty-eighth. Form of agreement with Ahtanum water users has my approval.

/s/ JAMES RUDOLPH GARFIELD

Secretary.

Plaintiff's Exhibit No. 11-28

DEPARTMENT OF THE INTERIOR
OFFICE OF INDIAN AFFAIRS,
WASHINGTON.

Refer in reply to the following:

June 27, 1908

Field Work

34564-1908

42782-1908

JFA

Subject: Agreement with
Ahtanum Creek water users.

The Honorable,

The Secretary of the Interior.

Sir:

On October 28, 1907 the Office, with the approval of the Acting Secretary, instructed Superintendent Lynch of the Yakima Agency to confer with Supervising Engineer Henny and arrange with him to meet in conference with Attorney Snively in order to ascertain the feasibility of effecting a compromise with the settlers on Ahtanum Creek (a boundary stream of the Yakima Reservation) upon the basis that during low water flow $\frac{1}{3}$ of the supply be apportioned to the Indians and $\frac{2}{3}$ to the settlers and if possible to procure the written consent of the settlers in interest.

On January 2, 1908 report was made to the Department regarding the progress of the negotiations and Supt. Lynch was instructed to continue his efforts to effect a compromise.

On January 29 you wrote Mr. Snively that if the settlers would appoint a committee and clothe it with full power to act for all the different interests, you would be in position to confer immediately with the committee and effect a final settlement of the different rights. You requested him to say to the representatives of all the interests that unless the committee was organized on or before March 15 it would be necessary for you to take up immediately the question of a bill in equity.

On March 13 the time was extended to April 10.

On April 13 you directed Chief Engineer Code to go to the Yakima Agency and assist Supt. Lynch in the negotiations.

On April 24 you telegraphed Mr. Code that he might accept a proposal to compromise on the basis of $\frac{1}{4}$ of the low water flow for the Indians and $\frac{3}{4}$ for the settlers.

On May 4 you transmitted to the Office a report from Chief Engineer Code with a form of agreement submitted for your approval.

On May 5 the Office recommended that you approve the agreement and on the same date you telegraphed Mr. Code that the form of agreement had your approval.

On May 23 the Office received, by reference from the Reclamation Service, "for appropriate action," Mr. Code's report of May 10 with the agreement duly executed in duplicate and two copies thereof verified by his affidavit. Mr. Code also enclosed a certificate of the committee and its attorney certifying to the ownership of the lands involved and a list of the present owners of the riparian lands to which the waters of Ahtanum Creek were adjudicated in the decision of Benton vs. John Cox, certified to by a responsible Yakima Abstract Company. He said that the power of attorney with the signatures of the water users was filed with the County Recorder and would be

forwarded to the Department as soon as the same had been recorded.

The Office is now in receipt of a letter from Supt. Lynch, dated June 20, with which he transmits a copy of the special power of attorney, certified by the County Recorder, from whose certificate it appears the power of attorney has been duly recorded.

The papers now appear to be complete and are transmitted herewith with the recommendation that you approve the contract in duplicate and return the same with the copies to this Office for appropriate disposition.

Very respectfully,

/s/ C. F. LARRABEE

Acting Commissioner

CJI

Plaintiff's Exhibit No. 11-36

DEPARTMENT OF THE INTERIOR
WASHINGTON

Jan. 23, 1913

The Director of the Reclamation Service,
The Commissioner of Indian Affairs.

Sirs:

With reference to the problem of irrigation for the allotted lands in the Yakima Indian Reservation (Wapato unit of the Yakima reclamation project):

In view of recent communications from and conferences with officers of your several bureaus, I deem it

opportune to restate in this letter for future guidance of you and your subordinates the policies definitely determined upon by me after full conference with the heads and legal officers of each Bureau.

(1) Secretary Hitchcock had lawful authority to limit the rights of the Indians in the low water flow of the Yakima River, and his limitation thereof to 147 cubic feet per second, which was a part of the general settlement of water rights in the Valley, is valid and binding. Any other conclusion would involve the acceptance of the doctrine that the Indians, by virtue of the treaty of 1853, ratified in 1859, then acquired a vested right in the water flowing in the Yakima River which is undetermined and must forever remain undeterminable as to quantity; for it is contended that it is to be measured at any time by what then appears to be the duty of water for that area of land which, from the economic and engineering standpoints it is then feasible to irrigate; that it must be measured fifty years hence by what then appears the duty of water for the area which it then appears feasible to irrigate; and so for any point of time in the future. This would make it impossible to measure the future water rights of the Indians at any time; would prevent all irrigation development outside of the Indian reservation; and would amount to a reservation of the total flow of the river without any obligation on the part of the Indians

to utilize the water which might thus flow forever unused to the sea. The Indian treaty negotiated in 1853 and ratified in 1859 was to make possible the permanent settlement of the Yakima Indians and their transformation into an agricultural people; to reserve an abundance of land and of water rights out of which the real need of the Indians for farms and for irrigation water for such farms could be satisfied as such needs might be determined by Congress or its duly authorized executive agent. It was not intended to reserve either lands or water rights above that measure, or to restrict the authority of Congress or of the Secretary of the Interior under the authority of Congress to determine the measure of the water rights needed by the Indians. . . .

The foregoing statement of principles is, of course, subject to modification if additional information or experience shows such modification to be necessary, and you should recommend any change therein that seems to you desirable from time to time. Until such change is made, however, your action and that of your subordinates should be controlled by the principles above stated.

Respectfully,

(Signed) WALLIS L. FISHER

Secretary.

Plaintiff's Exhibit No. 13-J**EXHIBIT A**

Refer in reply to the following: 5-1100

Irrigation
85193-07
F. L. S.

Address only the
Commissioner of Indian Affairs

**DEPARTMENT OF THE INTERIOR
OFFICE OF INDIAN AFFAIRS
WASHINGTON**

Jan. 15, 1919

Mr. Marvin Chase,
State Hydraulic Engineer,
Olympia, Washington.

My dear Mr. Chase:

The office is in receipt of your letter dated January 7, 1919, in further reference to the contract between the United States and numerous water users along Ahtanum Creek, dated May 9, 1908 and approved by the First Assistant Secretary of the Interior June 30 of that year.

Supervising Engineer L. M. Holt has been directed to carry out his operations on behalf of the Government in accordance with the terms of the aforesaid contract. In view of your earnest protestations with respect to this matter, the Office feels that it is justified in asking that you shall take such steps with respect to the white water users, who are parties to this contract, as may be necessary to require them to carry out their part of this agree-

ment as scrupulously as the Government shall be expected to do.

Very truly yours,

/s/ E. B. Merritt
Assistant Commissioner.

I-ELM-14

Received:
9:30 a. m.
Jan. 20, 1919
Office State Hydraulic Eng.

Plaintiff's Exhibit No. 13-A

Mar. 27, 1923

Mr. Marvin Chase,
Supervisor of Hydraulics,
Department of Conservation
And Development,
Olympia, Washington

Dear Mr. Chase:

I am in receipt of your communication of February 28, 1923, in further reference to the matter you discussed with me several months ago while I was at Olympia, Washington, regarding the determination of water rights on streams within the State to which Indian allotments are appurtenant.

The streams involved contained in the list of your letter are in whole or in part within Indian Reservations of the State of Washington. The Federal Government has exclusive control over the Indian lands and of sufficient water for irrigation purposes thereof. In this connection your attention is invited to the decision of the Supreme

Court of the United States in the case of *Winters vs. United States*, reported in 207 U. S. 564. In view of the holding in this case and the holdings in other cases involving Indian matters, this Department is without authority to submit the adjudication of the Indians' water rights to the tribunals of the State of Washington. I wish to assure you, however, that we will be pleased to cooperate with the State officials in so far as possible where infringement of the water rights of the Indians is not involved. It is, therefore, suggested you advise the procedure contemplated to be followed in determining the **water rights**, other than Indian, of the several streams mentioned. . . .

Respectfully,

(Sgd.) F. M. GOODWIN
Assistant Secretary.

3 ELM 12
I-18955

Plaintiff's Exhibit No. 11-47

Erle J. Barnes
Director

R. K. Tiffany
Supervisor of Hydraulics

STATE OF WASHINGTON
DEPARTMENT OF CONSERVATION
AND DEVELOPMENT
DIVISION OF HYDRAULICS
Olympia

July 19, 1927

Honorable Hubert Work
Secretary of the Interior
Washington, D. C.

My dear Mr. Work:

Your attention is directed to the enclosed clipping from the Yakima Daily Republic, the occasion for which was an order from Commissioner Burke of the office of Indian Affairs definitely repudiating a contract between the Department of the Interior acting on behalf of the Indian owners of certain lands in the Yakima Reservation on one side and white owners of lands irrigated from Ah-tanum Creek on the other, which contract was signed by W. H. Code for the United States and approved by the Secretary of the Interior on June 30, 1908.

Commissioner Burke's order, if carried into effect, would not only destroy this year's crop on some three thousand to five thousand acres of land but would totally and finally condemn as desert the same area of the most fertile and productive lands in the Yakima Valley. The order has since been suspended on request of Senator Jones but with the implication that it will be renewed next year.

On behalf of the owners of these thousands of acres of land including scores of the pioneers of irrigation development in this State and hundreds of their descendants, I wish to urge that the United States Government should keep faith with these settlers and that it do not repudiate this contract on which they have relied for nearly a score of years.

The Yakima Valley has made a truly wonderful irri-

gation development with a minimum of litigation over water rights and this due in no small part to the fact that the Department of the Interior, before approving construction of the Yakima project in 1905, required that all principal appropriators from the Yakima River should agree to limit their claims to the amounts of water then being diverted. This was generally done. The Department, in line with other appropriators, agreed to limitation of its water right for the Wapato project to one hundred forty-seven cubic feet per second. which was reported as the division being made for irrigation on the Wapato project at that time. A few years later. the white man having realized the value of Reservations lands, it became apparent that this amount was far too small and the Congress made an appropriation of \$635,000 to furnish stored water to make up the difference between one hundred forty-seven cubic feet per second agreed to and one-half of the estimated low-water flow, which was seven hundred twenty cubic feet per second. This was done as a matter of good faith with the Indians and the whites who purchased or leased land from them.

So that in 1908 when the Ahtanum agreement was signed, it was simply one step in the established program of water right adjustment by agreement rather than by litigation.

It was not, as Commissioner Burke says, a tentative agreement, but it was intended and believed to be by all

interested parties, a permanent settlement between the white owners on one side of Ahtanum Creek and the Indian owners on the other side. Since the agreement was reached it has been substantially complied with on both sides. There have been, perhaps, some unauthorized diversions, but in general the purpose of the agreement has been served.

And please bear in mind, Mr. Secretary, that the agreement as originally made was more than fair to the Indian owners. The division of water was made in proportion to the areas under irrigation at the time, i.e. 1908, on the two sides of the creek. There was no surplus for new development, not enough in fact, in dry years for the area already cultivated.

And furthermore, the appropriation, diversion and use of substantially all of the waters of the stream had been made by white owners on the north side of the creek many years before any irrigation of consequence was started on the Reservation. The first settlers in the Ahtanum Valley began irrigating as early as 1850. The latest ditch to be built of any consequence was the Johncox ditch built in 1884 and it, with earlier ditches, took more than the normal summer flow of the stream at that time though there was then very little or no irrigation from Ahtanum Creek on the Reservation. No considerable amount of Reservation land was irrigated from the creek until after 1900 so that when the agreement was

signed in 1908 the north side farmers actually relinquished the use of water most of which they had been diverting and using for many years.

Since that time there has been no material increase of cultivation on the north side of the stream but a steady increase on the south or Reservation side, this being done largely by white renters or owners, and constantly increasing pressure from these that the contract be repudiated and water taken from the white pioneers to be used on these newly-developed Reservation lands.

In 1923 and 1924, at request of the water users, the water rights of all lands north of Ahtanum Creek and served by it were adjudicated thru this office in the State courts. In that adjudication it was assumed that the agreement of the Secretary of the Interior with the white water users was valid and binding, and water rights were decreed on the basis of seventy-five per cent of the flow of the stream belonging to white owners for use on lands north of the creek.

Two hundred seventy-five water rights were decreed to two hundred seventeen individual owners, with one hundred nineteen different diversions, affecting some ten thousand acres of land. If the Government should now repudiate its contract all of these rights will be adversely affected, and the cost and effort of the adjudication largely wasted.

No question has been raised, Mr. Secretary, as to the fairness of the original agreement nor the authority of the Secretary to make such agreement, but the area under the Indian diversion has been largely increased, the need for water has grown and now it is proposed on a legal technicality to repudiate a contract in which reliance has been placed for nineteen years. I feel certain that Commissioner Burke is not fully informed or he would never have subscribed to such an order.

I respectfully urge that you advise the proper officials that the contract will be lived up to. If any further information is desired we shall be only too glad to furnish it.

Respectfully submitted,

/s/ R. K. TIFFANY

State Supervisor of Hydraulics.

R. K. Tiffany
E.K.

Plaintiff's Exhibit No. 13-A

Law Offices of
JOHN H. LYNCH
Yakima, Wash.

May 6th, 1929

Dr. Ray Lyman Wilbur,
Secretary of the Interior,
Washington, D. C.

Hon. and Dear Sir:

Re: Ahtanum water agreement.

Under date of June 30, 1908, the Honorable Frank

Pierce, First Assistant Secretary of the Interior, acting in behalf of the U. S. Government and the Department, approved an agreement settling disputed claims and apportioning the water of Ahtanum Creek to the Yakima Indian lands on the one side and to the white settlers' lands on the other. (See copy enclosed). . . .

The overwhelming weight of testimony now, or at any time heretofore, procurable for the purpose of showing the intent of the parties as to whether said contract should be tentative or final would certainly be in favor of finality. Note particularly the wording of the Power of Attorney authorizing the agreement on behalf of the white water users.

It is submitted that an investigation of the conditions existing at the time this agreement was made will disclose the fact that at that time only about 2000 acres, or less, of the Indian land was under cultivation and no considerable extension of irrigation was then deemed possible unless a new source of supply could be found and resorted to. Notwithstanding this fact, however, the white renters and purchasers of the Indian lands have been continually increasing the number of acres under cultivation and irrigation, until now the quantity sought to be served is approximately five thousand acres. At the time the contract was made it was well known that 25% of the natural flow of the Ahtanum stream could not possibly suffice to cover more than 2000 to 2500 acres of the Indian lands, but

despite that knowledge the irrigable acreage has more than doubled, with the result that in most seasons crops are bound to suffer, and there is a disposition on the part of the management of the Indian Canal to hold onto a greater share of the water than the agreement allots to the Indian lands. This is a chronic source of friction and has to be threshed out anew almost every season, until now the Indian Office (or at least its local representatives) are advocating the repudiation and arbitrary disregard of the terms of the agreement. . . .

May we, therefore ask the intervention of your good offices with a view to having this matter disposed of amicably.

Very respectfully yours,

/s/ JOHN H. LYNCH

Secretary for Ahtanum Irrigation District.

JHL:IM

Encls: 2

CC: Hon. W. L. Jones, U. S. Senate
 Hon. C. C. Dill, U. S. Senate
 Lester M. Holt, Supervising
 Engineer, Yakima, Washington
 R. F. Tiffany, State Supervisor
 of Hydraulics, Olympia, Washington.

Plaintiff's Exhibit 9 — page 10

Department of the Interior
 Office of the Solicitor

Washington, June 7, 1929

The Secretary of the Interior:

Dear Mr. Secretary: In connection with the use of water

for irrigation purposes from Ahtanum Creek, Wash., you have requested my opinion as to the law in the matter based on the facts disclosed by the record at hand. . . .

It has recently been suggested that there may be some question about the authority of the Secretary of the Interior to thus limit by agreement the rights of the Indians of the Yakima Reservation, particularly in view of decisions by the courts in the cases of *Winters v United States* (207 U. S. 564) and *Conrad Investment Co. vs. United States* (161 Fed. 829). Briefly these decisions are to the effect that the establishment of a reservation by agreement with the Indians impliedly reserved to the Indians a prior right to sufficient water for the irrigation of their lands, which right is paramount to that of other appropriators of such water pursuant to State laws.

While fully recognizing the soundness of the doctrine laid down in the cases referred to yet the matter now here turns on a somewhat different situation. In those cases no effort had been made and no action had been taken by this department defining or attempting to define the rights of the Indians in the premises. Section 7 of the general allotment act of February 8, 1887 (24 Stat. 308), expressly authorizes the Secretary of the Interior to prescribe such rules and regulations as he may deem necessary to secure an equitable distribution of water for irrigation purposes within any Indian reservation. Again, as Ahtanum Creek discharges into the Yakima River at

the northern boundary of this Indian reservation, it may seriously be contended that the provision made by Congress in the act of August 1, 1914, *supra*, directing the Secretary of the Interior to deliver at such northern boundary 720 cubic feet of water per second, was in full satisfaction of the rights of the Indians in and to the low-water flow of both the Yakima River and Ahtanum Creek. This is particularly true in view of the fact that the joint committee of Congress which investigated this matter had full information as to all preexisting agreements and understandings of this kind. It may further be pointed out that the agreement as to the division of water from Ahtanum Creek has stood practically unquestioned for a period of over 20 years and undoubtedly equitable and valuable property rights founded thereon have become established in third parties. According to a familiar rule vested rights thus created can not thereafter be disturbed at least by administrative officers of the Government. Hence, under the circumstances here at hand, I am of the opinion that you would not now be justified in ignoring or attempting to repudiate the agreement entered into in 1908 involving the division of waters of this stream.

In connection with this matter I observe from the records at hand several reports from engineers who have investigated this matter indicating that storage may be provided on the upper reaches of Ahtanum Creek, particular attention being invited to the report of September 10, 1920, of L. M. Holt, wherein it was recommended

that a storage project on Ahtanum Creek be undertaken. This may prove a feasible solution of the whole difficulty, particularly if sufficient storage can be made available for the lands in both Indian and white ownership, it appearing that the annual run-off of the Ahtnum watershed is around 70,000 acre-feet, which is ample for the irrigation of upwards of 17,000 acres of land.

Respectfully,

E. C. FINNEY, Solicitor.

JOS. M. DIXON,
First Assitant Secretary.

Approved June 7, 1929

Plaintiff's Exhibit 11-63

Law Offices of
JOHN H. LYNCH
Yakima, Wash.

June 24, 1929

Dr. Ray Lyman Wilbur,
Secretary of the Interior,
Washington, D. C.

My dear Dr. Wilbur:

Re: Ahtanum Creek Agreement

I beg to acknowledge a letter from your office signed by the Hon. Joseph M. Dickson, acting secretary, dated June 18th, 1929, with reference to the decision of the Department in regard to the division of the waters of the Ahtanum Creek between the Yakima Indian Reservation on the one hand, and the white settlers on the other. Our

people are very glad, indeed, to have a final disposition of this matter by the Department, abiding by the compromise of May 9th, 1908.

The white settlers involved and the officers of the Ahtanum Irrigation District, having charge of the distribution of this water, are very grateful and appreciative for the prompt and efficient manner in which your office has handled this rather unpleasant subject. On behalf of these water users and officers of said organization, I beg to assure you that an earnest endeavor will be made on their and our part to comply with the spirit, as well as the letter, of said agreement. As heretofore mentioned, we shall continue to cooperate with the officers of the Indian Reclamation Project in the matter of a reasonable rotation of these waters at such times as the whole supply awarded to the whites shall not be actually necessary for their use. And if the Indian representatives will reciprocate in like manner, I believe that the waters of the stream can be more extensively used, to the advantage of both parties.

With a view to getting this cooperation idea more thoroughly into the minds of the individual water users, I am handing a letter to the local press, a copy of which I enclose herewith.

Again thanking you and your associates and assistants for the courtesy and consideration given, I beg to remain,

Very truly yours,

/s/ JOHN H. LYNCH

Secretary for Ahtanum Irrigation District.

JHL-M
Enc.

Plaintiff's Exhibit 11-89

QUINTON, CODE and HILL
MEMBERS
AMERICAN SOCIETY OF CIVIL ENGINEERS
SUITE 712, STANDARD OIL BUILDING
TENTH STREET AT HOPE STREET
LOS ANGELES, CALIFORNIA

September 9, 1929

Mr. R. F. Tiffany,
Supervisor of Hydraulics,
Olympia, Washington.

Dear Mr. Tiffany:

Your letter of May 9th was found on my desk when I returned from quite an extensive trip, made chiefly for the benefit of my health. I hope our next trip in our own country will take us to the Northwest, as both Mrs. Code and myself are very fond of that part of the country.

You asked me if the memorandum of agreement executed on May 9th, 1908 between the writer, acting under the authority of the Secretary of the Interior, and the legal representatives of the white water users on the north side of the Ahtanum was intended to be permanent. It was certainly my understanding and belief that the agreement was to be a final one and intended to settle for all time

the question of the respective rights of the whites and Indians to the waters of the said creek.

Without access to data on which the agreement was predicated, I cannot, of course, attempt to enter into a detailed discussion of the various factors considered in negotiating that agreement which is now over twenty years old.

I felt at the time and still feel that the contract was as fair a one as could be obtained for the Indians, and recall distinctly that it required much hard work to secure the consent of the north side water users to the quotas finally decided upon. They believed that the extent of beneficial use of water on Indian lands at that date did not warrant the surrender of so large a percentage of the flow.

If the doctrine of prior appropriation and beneficial use is considered as applying in this instance, am confident that the records would show that the Indian lands had been more than fairly treated. I hope, however, that the Government can find means either through storage somewhere, or perhaps by underground water development, to augment the supply for the Indian lands on the south side of the creek.

With sincere regards,

Very truly yours,
W. H. CODE

WMC:LH

Plaintiff's Exhibit 11-70

5-1143

DEPARTMENT OF THE INTERIOR
UNITED STATES INDIAN IRRIGATION SERVICE
SUPERVISING ENGINEER

Yakima, Washington
August 2, 1930

Commissioner of Indian Affairs
Washington, D. C.

Dear Sir:

* * * *

I made note of the gage at the Cipoletti weir at the head, but did not have access to a table until Sunday morning. I found then that we were getting more than twelve second feet of the 28.8 second feet in the Creek. I got in touch with Mr. Redman over the telephone and instructed him to cut our diversions down to 25% as called for in the Agreement of 1908. Since that time the Indian Canal has been getting its 7.2 second feet of water. . . .

Yours very truly,

/s/ L. M. HOLT

Supervising Engineer

LMH:L

Plaintiff's Exhibit 11-71

AHTANUM IRRIGATION DISTRICT
Yakima, Washington
August 9th, 1930

Directors
C. H. Brooks

Officers
C. H. Brooks, President

Merle Carson
Wm. Greenwalt

John H. Lynch, Secretary

The Honorable,
The Secretary of the Interior,
Washington, D. C.

Dear Mr. Secretary:

Re: Ahtanum Creek,
Washington.

Owing to the nature of the controversy, and for the reasons hereinafter mentioned and referred to, it is the desire of the writer that the matter in hand be referred to and considered by the Honorable Secretary himself, or the acting head of the Department.

Reference is respectfully made to the following documents:

1. The letter of the undersigned addressed to the Honorable Secretary, dated May 6, 1929.
2. The Honorable Secretary's letter of May 23, 1929, addressed to the undersigned.
3. Departmental letter of June 18, 1929, addressed to the undersigned, and signed by the Hon. Jos. M. Dixon, acting secretary.
4. Departmental letter of June 19, 1929, addressed to the undersigned and signed by the Hon. E. K. Burlew, administrative assistant. Also the inclosed report of the Honorable Solicitor of the Department, dated and approved the 7th day of June, 1929.

As will appear from the above references, the Department after considering the law and the facts, decided

to abide by the compromise agreement and settlement of May 9, 1908, apportioning the waters of the Ahtanum Creek one-fourth to the lands on the Yakima Indian Reservation, and three-fourths to land of white owners situate north of said creek. . . .

Very respectfully yours,
/s/ JOHN H. LYNCH
Secretary and attorney for
Ahtanum Irrigation District.

JHL:IM

cc: Hon. W. L. Jones, U. S. Senate
Hon. C. C. Dill, U. S. Senate
Hon. John W. Summers, M. C.

Plaintiff's Exhibit 9 — page 6

DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR

Washington

March 18, 1931

The Secretary of the Interior.

My dear Mr. Secretary:

You have submitted to me for opinion certain questions propounded by the Commissioner of Indian Affairs relative to the water rights on Ahtanum Creek, a stream forming the northerly boundary of the Yakima Indian Reservation in the State of Washington. The questions submitted are as follows:

1. Whether certain old Indian rights to the use of water from the south fork of Ahtanum Creek were taken into consideration when the agreement of 1908 was made.

2. Whether the division of the water on the basis of 75-25 in the agreement of 1908 was without limitation as to time of use throughout the season or was confined to the period of low water usually beginning about the middle of June.
3. Whether the parties representing the Government had authority to bind and limit the use of water upon the Yakima Indian Reservation along the lines set forth in the agreement of 1908. . . .

In question No. 3 we are presented with greater difficulties, as it involves the treaty rights of the Indians and also the right of the Secretary of the Interior to make a contract for and on behalf of the Indians which would limit their rights to the diversion of the waters of Ahtanum Creek, which is the northerly boundary of the reservation. From the portion of the treaty previously quoted it is shown that the boundary is fixed as commencing on the Yakima River thence proceeding westerly along said Ahtanum River to the forks. These words give little information as to whether the boundary line was the thread of the stream or whether it would be on the north or the south bank of the stream. The land on the northbank of Ahtanum Creek and west of the Yakima River was surveyed July 14, 1864. This survey was by meander lines along the north bank of the creek. The survey of lands on the south bank of the stream lying west of the Yakima River, which is on the present Indian reservation, was made February 7, 1893. This line was also meandered. There was no attempt to establish a line in the bed of the stream. It might be asserted that the meander line on

the south bank was all that represented the boundary of the Indian reservation because that would be land within the limits of the area described in section 2 of the treaty of 1855. The Supreme Court of the United States in the case of *Oklahoma v. Texas* (256 U. S. 90) would not give such a narrow interpretation to the words used. Further, the Supreme Court decisions lead to the conclusion that where a stream marks the boundary between sovereignties, the thread of the stream is the line which represents the division of authority.

The records in the Indian Office indicate that a dispute arose in 1907 relating to the division and use of waters from Ahtanum Creek and that arrangements were made that year looking to the institution of a suit to determine the rights of the parties. After negotiations had been carried on for some time the contract of May 9, 1908 was involved which divided the waters as above explained. At that time the case of *Winters v. United States*, *supra*, was pending in the courts and after the decision was rendered by the Supreme Court of the United States it was contended that the Secretary of the Interior had by such contract deprived the Indians on the reservation of some of their rights by entering into the agreement of May 9, 1908.

In the case of *Winters v. United States* the conditions are, in my opinion, different than those presented by the conditions existing at the time the treaty was made in

1855 with the Yakima Indians. In the Winters case the court was considering a treaty made May 1, 1888 (25 Stat. 113). It described the boundary of the reservation as beginning at a point in the middle of the channel of Milk River opposite the mouth of Snake Creek; thence due south to a point . . . thence due east . . . thence following the southern crest of said mountains . . . thence in a northerly direction to a point in the middle of the main channel of Milk River opposite the mouth of Peoples Creek; thence up Milk Creek in the middle of the main channel thereof to the place of beginning. . . .

At the time the treaty was made in 1888 irrigation had been practiced in Montana, where this reservation was located, for 20 or 30 years. At the time the treaty was made with the Yakima Indians in 1855 irrigation was practically unknown in the United States except for some areas irrigated by the Mormons in Utah beginning in 1847 and for some irrigation in California. There was evidently no intention of the parties to the treaty of 1855 to consider the question of the use or division of title to the waters of Ahtanum Creek.

Assuming that the treaty did not decide the rights to the waters of Ahtanum Creek but that the people living along the stream might appropriate and use the waters, we find that a dispute arose, and in 1907 it was agreed that the water should be divided on the basis of 25 per cent to the lands on the south side of the stream and 75 per

cent to the lands on the north side of the stream when it became necessary to divide the waters. It is asserted in the record in the Indian Office that this division was based upon the determination that at that time 4500 acres were irrigated by whites on the north side of the stream and 1500 acres on the south side of the stream. In other words, it was a division of the waters based upon beneficial use at the time the agreement was made. With these facts in view, does the Secretary of the Interior have authority to make a contract which would limit the use of water to the Indian Lands on the reservation? Water used for irrigation purposes is an appurtenance to the land on which it is used. In this respect it can be considered real estate, and the rules of law regarding real property should be applied in determining the rights of the parties. To dispose of some of the water in the boundary stream of the reservation by sale or otherwise involves the right of the Secretary of the Interior to dispose of the property of the Indians of a reservation. . . .

The authority of the Secretary of the Interior attempted to be exercised in this instance has reference to a treaty between the United States and an Indian tribe, and there is considerable doubt in my mind whether he has authority to divest the tribe of any of the rights in real property held by the Indians. It has been held by me in two decisions that the contract of May 9, 1908, should not be abrogated by the United States because it has been in force for more than 20 years and valuable

rights have been acquired by acting upon the terms of the agreement. This is evidenced by the decree by Judge Nichoson in the Supreme Court of the State of Washington in and for Yakima County May 7, 1925, wherein he adjudicated and determined the water rights of the landowners on the north bank of Ahtanum Creek and settled the priority rights of such landowners. The rights of the Indians and of the whites have been established and grown for over 20 years on the basis of the agreement of May 9, 1908, and it is my opinion that the rights should not be disturbed by an abrogation of the agreement on the theory that the Secretary of the Interior did not have authority to make the agreement for the Indians.

Very truly yours,

E. C. FINNEY, Solicitor.

Jos. M. Dixon,
First Assistant Secretary.

Approved March 18, 1931

Plaintiff's Exhibit 9 — page 30

STATEMENT OF EDWARD C. FINNEY

MR. FINNEY. Mr. Chiarman. I am not here to advocate the passage of this bill or to oppose the passage of the bill. I understand I am here at the request of the committee and probably because during the last two or three years I, as solicitor for the department, have rendered three opinions which, among other things, advised the Secretary of the Interior that this agreement is valid

and should be adhered to. Without taking too much time in backtracking, I would like to give a few facts in order to orient myself. . . .

In the Milk River case, the treaty specifically provided that the boundary should be the middle of the channel of Milk River and that fact was commented on both by the United States District Court and by the Supreme Court in discussing the so-called Winters case and which I assume had some bearing on their decision. I do not believe that the District Court of the United States or even the Supreme Court—this is my opinion only—went as far as has been contended by some of our friends in the Indian Office. It is true there is a general principle laid down in the case, but the court is very careful to say and both courts:

We are of the opinion when all of the facts, circumstances and conditions, and surroundings of the Indians at the time the treaty was entered into are considered, it can not be judicially said no portion of the water of Milk River was reserved by the terms of the treaty for the use and benefit of the Indians residing upon the reservation.

That is Federal Reporter, 143, page 745.

MR. FINNEY. They did, but they did not hold that the Indians were entitled to all the water of the Milk River. The Indians never got all the water of Milk River. They got approximately 50 per cent. It is my view, whether right or wrong, there being water there which might be taken and used by the Indians and by the whites,

that in 1906 this controversy arose and in settlement of the controversy the representatives of the Indians, the Secretary, and the whites, made this contract, and they divided it at that time approximately according to the acreage which was being irrigated. At that time there was some 1,223 acres being irrigated of Indian lands and some 4,600 acres being irrigated on the outside of the reservation boundaries, so that the division was based largely upon the use at that time being made of the water.

That agreement was entered into and no controversy arose until a dry season came or until the latter part of an irrigation season, when a shortage of water occurred and then people began to question the agreement. In the meantime the whole Yakima country had gotten into a controversy as to the rights of the Indians, the water, and so forth, and a congressional commission went out there in 1913 and made a report from which I think the chairman read a few minutes ago, Senate Document 337 Sixty-third Congress, second session. As a result of that, Congress passed an act in 1914 in which they allotted certain water from the Yakima River for the benefit of the Indians. They said they had been unjustly deprived of a part of the natural flow of the Yakima River and directed the Secretary of the Interior to deliver at the north boundary of the reservation sufficient water in addition to 147 cubic feet per second previously allotted to the Indians to give the Indians during the whole water-irrigation season at least 720 cubic feet per second,

this quantity being considered equivalent to any satisfaction of the rights of the Indians in the low-water flow of the Yakima River and adequate for the irrigation of 40 acres on each Indian allotment. In my opinion I say it might be argued that this was in satisfaction of the rights of the Indians. It is true this committee did not consider during this investigation the matter of Ahtanum Creek but they certainly knew that this agreement had been made. They knew there had been a controversy over the water and they knew that Ahtanum Creek was a tributary of the Yakima. . . .

Plaintiff's Exhibit No. 11-79

WESTERN UNION

Received at 708 14th St., N. W. Washington, D. C.

1931 Apr 10 PM 8

CC984 57 NL GOVT COLLECT — YAKIMA WASH 10
COMMISSIONER OF INDIAN AFFAIRS—

WASHINGTON DC—

PLEASE ADVISE IF WE SHOULD CUT DOWN TO
TWENTY FIVE PER CENT OF THE FLOW OF AH-
TANUM CREEK PRIOR TO LOW WATER FLOW
PERIOD STOP WHITE WATER USERS DEMAND
THAT DIVERSION BE REDUCED IN ACCORDANCE
WITH THEIR CONSTRUCTION OF THE AGREE-
MENT OF NINETEEN EIGHT IMMEDIATE DE-
CISION NECESSARY FOR DIVERSION PENDING

FINAL OPINION AS TO CONSTRUCTION OF AGREEMENT —

HOLT

Western Union
Day

Indian
Gen. Exp. Ind. Ser. 1931
Washington, D. C. April 11, 1931

Holt, Supervising Engineer,
Indian Irrigation Service,
Yakima, Washington.

Retel tenth. See pages four to seven inclusive of copy of
opinion by Solicitor approved March eighteen amending
in part opinion May twenty-four nineteen hundred thirty
dealing with division Ahtanum water and pending final
action by attorney general proceeding compliance there-
with.

(Signed) C. J. Rhoads
RHOADS

Approved:
Apr. 13, 1931
(Sgd) Dixon
First Assistant Secretary

Irrigation
18955-23
21597-31

S J F — mes

Copy to H. V. Clotts.

Plaintiff's Exhibit No. 11-101

10
H. R. 10351
Mar 22 1932

AHTANUM
MEMORANDUM FOR THE SECRETARY

This is in reference to a letter addressed to you from Hon. Robert S. Hall, Chairman of the Committee on Irrigation and Reclamation, House of Representatives, with which he transmitted a copy of H. R. 10351 (72d Congress, 1st sess.) for your consideration and report. . . .

With a view to arriving at a working understanding of the matter, what is known as a Memorandum Agreement was drawn up as of date May 9, 1908, in connection with which the Government was represented by Mr. W. H. Code, at that time Chief Engineer of Irrigation for the Indian Service, and water users were represented by W. W. Glidden, Mary J. Glidden, his wife, and others as named in the proposed legislation. Based upon the facts as they then existed, it was agreed to divide the waters of Ahtanum Creek so as to permit the Indian lands of the reservation to receive 25 per cent of the normal flow and the white settlers north of the creek to receive 75 per cent of the normal flow. That adjudication approximately represented the proportionate acreage of the lands irrigated from the creek at that time. That is to say the area of white-owned land was at that time approximately three times as large as the area of Indian reservation land depending upon Ahtanum Creek for water supply.

Special attention is invited to the fact that this agreement, a copy of which is attached, is entitled "Memoran-

dum of Agreement," and it has been the consistent contention of the Indian Service that such agreement was entered into merely as a working understanding to meet the conditions as they existed at that time, and was not necessarily intended to be a binding agreement at such future time as the conditions should be radically changed. During the years intervening since the execution of the agreement, the area or irrigated Indian lands within the reservation depending upon Ahtanum Creek for water supply, has greatly increased. This increase in acreage being to such an extent that 25 per cent of the normal flow of the creek is altogether inadequate for successful crop growing during the later months of the irrigation season. It is further contended that in accordance with principles well established by decisions of the courts, the Indian reservation lands are entitled to a larger portion of the flow of the stream if such additional water is needed to irrigate the lands. . . .

It is clearly evident, it is believed, that the provisions of the agreement under consideration do not adequately cover the situation as it now exists either as to the major point of the division of the water or as to the numerous operations involved in the four features above outlined. It is for this reason that the Indian Service insists upon the importance of a final determination of the matter by the court by consent decree or otherwise. If, in the meantime the agreement of 1908 which we believe has so clearly been shown to be inadequate, should

be confirmed by an act of Congress, it would, to say the least, considerably prejudice the case against the interests of the Indians if it should come into court for final action.

It is respectfully recommended, therefore, that H. R. 10351 (72d Cong., 1st Sess.) do not receive favorable consideration.

C. J. RHOADS
Commissioner.

3 ELM 19

Plaintiff's Exhibit No. 11-102

THE SECRETARY OF THE INTERIOR
WASHINGTON

Mar 23 1932

Department of the Interior
Washington
Copy for Information of
Indian Office

AHTANUM

Hon. Lynn J. Frazier,
Chairman, Committee on Indian Affairs,
United States Senate.

My dear Mr. Chairman:

I have your request for report of March 18, 1932, on S. 3998, a bill approving and confirming the contract for apportionment of the waters of Ahtanum Creek, Washington, dated May 9, 1908.

The records of the department show that the agreement in question was approved after a long period of negotiation between the officers of the department and

the white settlers on the north side of Ahtanum Creek. In 1907, faced with a suit in equity to enjoin the use of waters of that creek, except as to those who had a right thereto equal or prior to the reservation, the white settlers were prevailed upon to enter into a compromise to avoid litigation. During the course of the negotiations, the Indian Service claimed a division of the water on the basis of two-thirds to the whites and one-third to the Indians. The then Acting Commissioner of Indian Affairs, on October 25, 1907, addressed a communication to the Secretary of the Interior setting up the status of the negotiations, in which he made the following statement:

“In the event of failure of negotiations on this basis I should be willing to accept a division based on the exact acreage now irrigated on the respective sides of the creek, but the one and two-thirds basis should first be pressed to the limit.”

This letter was approved by the Acting Secretary of the Interior on October 26, 1907.

On January 29, 1908, the Secretary of the Interior addressed H. J. Snively, North Yakima, Washington, as follows:

* * * * *

As result of further negotiations an agreement was entered into on June 30, 1908, between the water users and the department, dividing the water on the basis of 75 per cent to white settlers and 25 per cent to Indian settlers. A copy of the agreement is inclosed herewith.

The Indian Service now, after twenty-four years, claims that due to the increased acreage of Indian lands under irrigation, twenty-five per cent of the normal flow of the creek, which is the division embodied in the agreement, is inadequate for successful crop raising during the latter months of the irrigating season, and an effort was made by field representatives of the service in the fall of 1931 to negotiate a new agreement with the white water users who were represented by the officers of their irrigation district. This tentative agreement was repudiated by resolution of the water users themselves on February 29, 1932. The agreement was to cover only the season of 1932 but was to be used as a basis for a consent decree at a later date.

Since this action by the water users, the only basis for dividing the waters is under the 1908 agreement; but the authority of the Secretary of the Interior to enter into an agreement of this nature has been questioned, which has the effect of casting doubt upon the validity of the 1908 agreement.

The evident purpose for S. 3998 is to validate and confirm the agreement of 1908, and thus afford a basis for definite future construction of disputes arising under the agreement. These questions relate to the interpretation of the agreement rather than to its validity, and may be set out as follows:

1. Whether the provisions in the agreement of 1908

for the diversion of water are effective throughout the entire year or only through the low water season.

2. Whether the waters of the South Fork of Ahtanum Creek before its junction with the main stream are at all subject to the agreement of 1908.
3. Whether natural channels of small tributaries of the creek may be used for diverting water under the agreement of 1908 instead of properly constructed canals.
4. The question of appointing the watermasters, and the construction of necessary head gates and the payment of the salaries and expenses in connection therewith.

These questions can be settled either by agreement or in court after the enactment of the legislation. I have been informed that the white water users are agreeable to seeking an interpretation of the agreement in the courts.

It may be that ultimately the irrigation needs of both the white settlers and the Indians will require and justify the construction of a storage reservoir on the upper reaches of Ahtanum Creek or the construction of a pumping system to supplement the water supply of these lands.

During the twenty-four years that have elapsed, undoubtedly equitable and valid property rights founded upon the 1908 agreement have been established in third parties, and according to a familiar rule of law, vested rights thus created cannot be disturbed by administrative

officers of the Government. Unless I am prevented by court action, I propose to adhere to the agreement of 1908. I, therefore, have no objection to the enactment of this legislation which I believe will be one step in the final settlement of a dispute running over many years.

Very truly yours,

(Sgd.) RAY LYMAN WILBUR

Secretary.

Enclosure 2786

(A duplicate of the above letter, being Exhibit 11-100 withdrawn was sent to Congressman Robert S. Hall, Chairman of the Committee on Irrigation and Reclamation of the House of Representatives, dated March 22, 1932.)

APPENDIX C
IN THE UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, <div style="text-align: right; padding-right: 20px;"><i>Appellant</i></div>	}	No. 14714 AFFIDAVIT OF CHARLES L. POWELL
<i>vs.</i>		
AHTANUM IRRIGATION DISTRICT, et al., <div style="text-align: right; padding-right: 20px;"><i>Appellees.</i></div>	}	
STATE OF WASHINGTON } County of Benton. }	}	<i>ss.</i>

CHARLES L. POWELL, being first duly sworn, on oath deposes and says:

That he is one of the attorneys for the appellee, Ahtanum Irrigation District, a public corporation. That he and his associate Fred C. Palmer have been recently requested by the Ahtanum Irrigation District to obtain an injunction pending appeal to preserve the status quo of the respective parties and to maintain pending this appeal the division of the flow of Ahtanum Creek during the irrigation seasons hereafter and until the final decision in this appeal as determined and adjudged by the United States Circuit Judge James Alger Fee, the Trial Judge of this case.

That the motion is based upon the record on appeal in this cause and upon the affidavits attached. The affiant

alleges that in the trial of this cause it was determined that an agreement of May 9, 1908, was a valid and binding agreement under which the flow of Ahtanum Creek was divided between the appellant, United States of America, acting in behalf of its Indian wards, and the landowners, who are the predecessors in interest to the appellees in this cause, the appellant to receive 25% of the flow of Ahtanum Creek and the predecessors of the appellees to receive 75% of the flow of Ahtanum Creek.

That subsequently and in the year 1926 the State of Washington, which then had jurisdiction over the waters of Ahtanum Creek, adjudicated all of the claims of the landowners on the north side of Ahtanum Creek to 75% of the flow of Ahtanum Creek, which proceeding was binding upon the United States of America, the appellant herein, and the Trial Court has held that such adjudication barred any claim by the appellant to that portion of the flow of Ahtanum Creek (R. 165).

That affiant is informed and believes and therefore alleges the fact to be that pending the trial of this cause no application was made for an injunction for the reason that the flow of Ahtanum Creek was abnormally high during the entire irrigation seasons involved.

That there is no storage on Ahtanum Creek and no place for adequate storage. That the flood waters in the spring and early summer furnish an adequate supply of water for all landowners and users but that during the

months of July, August and September there was in the season of 1955, and there is threatened to be in the season of 1956, a distinct shortage of water, which would result in irreparable damage and injury to the landowners in the Ahtanum Irrigation District.

That it is impossible to measure damages resulting from the withholding of irrigation water from irrigated farms for the reason that the difference in value of the crops is impossible to exact measurement and determination; that there is no plain, speedy and adequate remedy at law for this appellee or for any of the private individuals, appellees in this cause.

That unless an order is entered preserving the status quo and enjoining the appellant from interfering with the portion of the flow of Ahtanum Creek set aside to appellees, irreparable damage and injury may occur.

That all of the parties are before this Court and that application has been made for an injunction pending appeal to the United States District Court, for the Eastern District of Washington, Southern Division, which application was made by petition and an order requiring appearance and answer. That at the hearing on December 30, 1955, before the Honorable William J. Lindberg, United States District Judge, the Court granted a motion to dismiss the petition on the ground and for the sole reason that the District Court had no jurisdiction of the cause, it having been divested of said jurisdiction by the appeal.

That this Honorable Court should entertain this petition based solely upon the records in this cause, or in the alternative should by appropriate order, without changing the status of the parties on appeal, authorize and direct the United States District Court, for the Eastern District of Washington, Southern Division, to take evidence pursuant to the petition concerning the necessity for the preservation of the status quo of the respective parties to this appeal until it is finally determined.

That the method of procedure outlined and requested in this motion will avoid a multiplicity of suits, will enable this Court to adjudicate and settle all matters between the parties in this one cause, will provide an orderly procedure for determination of the rights of the respective parties and will enable the Court to proceed to a final adjudication without changing the status of the parties pending the appeal.

WHEREFORE, affiant respectfully prays that the motion for injunction pending appeal be granted and that an injunction be issued pending appeal directed to the appellant, enjoining the appellant from interfering with 75% of the flow of Ahtanum Creek, to which the appellees are entitled, and enjoining it from taking more than 25% of the flow of Ahtanum Creek at any time during the irrigation season of 1956, or thereafter until this appeal is determined, or in the alternative that the cause be remanded to the District Court solely for the purpose of

taking additional testimony on the necessity for the issuance of said injunction pending the appeal and the threatened irreparable damage and injury to the appellees.

Charles L. Powell

Subscribed and sworn to before me this 3rd day of January, 1956.

Floyce Paulson,
Notary Public in and for the State of
Washington, residing at Kennewick.

IN THE UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant

vs.

AHTANUM IRRIGATION DISTRICT,
et al,

Appellees.

No. 14714

AFFIDAVIT
OF
FRED C.
PALMER

STATE OF WASHINGTON }
County of Yakima.

ss.

FRED C. PALMER, being first duly sworn, on oath deposes and says:

That he is one of the attorneys retained by the appellee, Ahtanum Irrigation District, and makes this affidavit in support of appellee's motion for an injunction pending the appeal of the above captioned case.

That during the irrigation season of 1955, particularly during the months of July, August and September and commencing with July 19, 1955, the Water Master for the Wapato Project, United States Indian Service, with headquarters located in Wapato, Washington, diverted water for the benefit of the lands lying south of Ahtanum Creek greatly in excess of the amount allocated to such lands in the 1908 agreement and greatly in excess of that adjudicated as belonging to the lands lying south of Ahtanum Creek in accordance with the findings of

fact and conclusions of law entered by the Hon. James Alger Fee in the above captioned case when he was sitting as a District Judge in said case on November 9, 1954.

That the dates, amounts and percentages of diversion were as follows:

Date	return flow including Total flow	U.S.I.S. Diversion by	Diversion Percentage of
July 19, 1955.....	67.4 cfs.	31.5 cfs.	46.7%
July 26, 1955.....	50.1 cfs.	27.4 cfs.	54.7%
August 2, 1955.....	42.3 cfs.	17.1 cfs.	40.4%
August 4, 1955.....	42.7 cfs.	17.5 cfs.	41. %
August 9, 1955.....	38.2 cfs.	14.9 cfs.	39. %
August 16, 1955.....	36.9 cfs.	13.7 cfs.	38. %
August 23, 1955.....	33.9 cfs.	12.9 cfs.	38. %
August 30, 1955.....	32. cfs.	10.7 cfs.	34. %
September 8, 1955.....	30. cfs.	10. cfs.	33.3%

That as can be seen, there is considerable variance in the diversions made by the United States Indian Service, but that all of said diversions were substantially in excess of the 25% adjudicated in the District Court as belonging to the lands lying south of Ahtanum Creek; that because of such excess diversions, the lands lying north of the Ahtanum Creek were very short of water and many crops dried up and were lost as a result thereof; that the farmers owning land lying to the north of said creek suffered irreparable injury during the 1955 irrigation season and the excess diversions by the Indian Service, in the opinion of your affiant, will undoubtedly continue during the 1956 irrigation season unless the decree and judgment of the District Court is implemented by an in-

junction limiting the lands lying south of Ahtanum Creek to 25% of the flow during the 1956 irrigation season, and thereafter until the further order of this court.

WHEREFORE, your affiant respectfully moves that appellee's motion for an injunction be granted as prayed for.

FRED C. PALMER

Subscribed and sworn to before me this third day of January, 1956.

ELERY A. VAN DIEST
Notary Public in and for the State of
Washington, residing at Yakima, Wash.

IN THE UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, <div style="text-align: right;"><i>Appellant</i></div>	}	No. 14714
<i>vs.</i>	}	AFFIDAVIT
AHTANUM IRRIGATION DISTRICT, et al, <div style="text-align: right;"><i>Appellees.</i></div>	}	OF
STATE OF WASHINGTON } County of Yakima. } ss.	}	CHARLES L. POWELL

CHARLES L. POWELL, being first duly sworn, on oath deposes and says:

That he is one of the attorneys for the appellees in the above entitled action and makes this affidavit in support of the motion for injunction now pending in this court.

That there is attached hereto marked Exhibit "A" and made a part hereof a certified copy of a report by the Water Master of Yakima County, State of Washington, to the Supervisor of the Division of Water Resources of the State of Washington showing the diversion of waters from the Ahtanum Creek during the year of 1955 and the relationship between the diversions of the Ahtanum Irrigation District representing the landowners on the north side of the Creek and the United States Indian Service representing the Yakima Reservation water users.

CHARLES L. POWELL

Subscribed and sworn to before me this fourteenth day of February, 1956.

M. C. DELLE
NOTARY PUBLIC in and for the State of
Washington, residing at Yakima, Washington

January 12, 1956

Mr. M. G. Walker, Supervisor
Division of Water Resources
Transportation Building
Olympia, Washington

Re: Ahtanum Irrigation District

Dear Mr. Walker:

The weekly reports for the 57 days (July 19th to September 13th inclusive) last year that periodic checks were made of the flows are summarized on the attached tabulation.

Further comparisons of acre feet per acre diversions to other areas during the same period are as follows:

<u>Projects</u>	<u>Total Ac. Ft.</u>	<u>Area Irrigated</u>	<u>Ac. Ft. Per Acre</u>
U.S.I.S. Ahtanum Ditch.....	2,066	4,800 Acres	0.43
Ahtanum Irr. Dist.....	2,838	10,000 Acres	0.28
US-BR Roza Div.....	109,025	67,637 Acres	1.61
Sunnyside Valley Irr. Dist.	140,509	99,993 Acres	1.41
U.S.I.S. Wapato Project.....	194,271	123,748 Acres	1.57

The above data on the last three projects is from the U. S. Bureau of Reclamation, Yakima office, which has just completed checking the records through the period in

question. On the Roza and Sunnyside Projects there is little recovery and reuse of water. The Wapato Project recovers and reuses a substantial part of its river diversions. Diversions are used here since the basis of comparison is similar in the attached data.

Using the Ahtanum Irrigation District as a base, since it is the lowest, we have the following comparisons:

<u>Project</u>	<u>Ac. Ft./AC</u>	<u>Comparisons</u>
Ahtanum Irr. Dist.	0.28	1.00
U.S.I.S. Ahtanum Ditch	0.43	1.54
Sunnyside	1.41	5.04
Wapato	1.57	5.60
Roza	1.61	5.75

There is of course, recovery and reuse by the Ahtanum water users, but the above flows to the Wapato do not include any use made of the Satus and Toppenish creek flows which are considerable at times during the irrigation season.

The foregoing comparisons show that where water was available by reason of storage other areas used 5.04 to 5.75 times the water the Ahtanum Irrigation District received during the 57 days of record here reviewed. In view of the very low acre feet per acre the Ahtanum District received it is difficult to understand how the Government attorneys conclude there is "wanton" and "unconscionable" waste of water on the north side of the creek.*

There has been waste water along the roads at intervals but that is not confined to the north side. You will note

the return flow over the 4-foot weir was estimated on two occasions in August. At those times the waste water over the access lane was sufficient to cause doubt as to getting back up to the county road if I drove down to the weir. The road and lane are on the reservation side of the creek.

Yours very truly,

G. D. Hall
Water Master
Yakima County

*See letters and Brief No. 14714 Ninth Circuit U. S. Court of Appeals.

GDH/rw

cc: Mr. Ray N. West
Mr. Fred C. Palmer
Mr. Chas. H. Powell

Date	Flows in CFS		Total CFS	Totals		USIS Divers.	CFS	Totals		Remarks
	S. Fk.	N. Fk.		Ac.ft./D	Ac.ft./wk			Ac.ft./D	Ac.ft./Wk	
July 19.....	13.4	49.5	4.5	67.4	133.6	4.5	24.9	29.4	58.3	
	Av. & Totals				116.5				56.3	
July	11.0	36.0	3.1	50.1	99.3	3.1	24.3	27.4	54.3	
	Av. & Totals				91.6				54.2	
Aug. 2.....	9.9	30.0	2.4*	42.3	83.9	2.4*	24.9	27.3	54.1	Flow at 11:00 A. M.
	Av. & Totals				84.3	2.4*	14.7	17.1	33.9	Cut at 11:55 A. M.
Aug. 4.....	9.9	30.0	2.8	42.7	84.7	2.8	14.7	17.5	34.7	Recheck
	Av. & Totals				80.2				32.1	
Aug. 9.....	8.9	26.7	2.6*	38.2	75.8	2.6*	12.3	14.9	29.5	
	Av. & Totals				74.5				28.3	
Aug. 16.....	7.6	27.3	2.0	36.9	73.2	2.0	11.8	13.7	27.2	
	Av. & Totals				70.2				26.4	
Aug. 23.....	7.2	25.5	1.2	33.9	67.2	1.2	11.7	12.9	25.6	
	Av. & Totals				65.4				23.4	
Aug. 30.....	6.8	24.0	1.2	32.0	63.5	1.2	9.5	10.7	21.2	
	Av. & Totals				61.5				20.5	
Sept. 6.....	6.2	23.0	0.8	30.0	59.5	0.8	9.2	10.0	19.8	
	Av. & Totals				56.5				19.9	
Sept. 13.....	6.4	20.0	0.6*	27.0	53.5	0.6*	9.5	10.1	20.0	

Totals for Period
Less U.S.I.S. Diversions
Total to Ahtanum Irr. Dist.

4,904.9 Ac. Ft.
2,066.4 Ac. Ft.

2,838.5 Ac. Ft.

°Relative diversions

0.28 Ac. Ft./AC—Ahtanum District

0.43 Ac. Ft./AC U.S.I.S.

Rights under 1908 Agreement
District was short in above period

3,678.7 Ac. Ft. to Irr. Dist.
840.2 Ac. Ft.

U.S.I.S. was over

1,226.2 Ac. Ft. to U.S.I.S.
840.2 Ac. Ft.

°No readings — Estimated

°Ahtanum Irr. Dist. 10,000 Acres

°U.S.I.S. cropped area 4,800 Acres

This is to certify that the attached is a true and exact copy of the letter of January 12, 1956 from G. D. Hall, Watermaster of Yakima County, as contained in the files of Ahtanum Creek of which we have custody.

Dated this 1st day of February, 1956 at Olympia, Washington.

/s/ M. G. WALKER
M. G. WALKER, Supervisor
DIVISION OF WATER RESOURCES

Subscribed and sworn to before me this 1st day of February, 1956.

/s/ MARIE STRUCK
Notary Public in and for the State of
Washington residing at Olympia.

No. 14714

**In the United States Court of Appeals
for the Ninth Circuit**

UNITED STATES OF AMERICA, APPELLANT

v.

**WATKINS IRRIGATION DISTRICT, A CORPORATION, ET AL.,
APPELLEES**

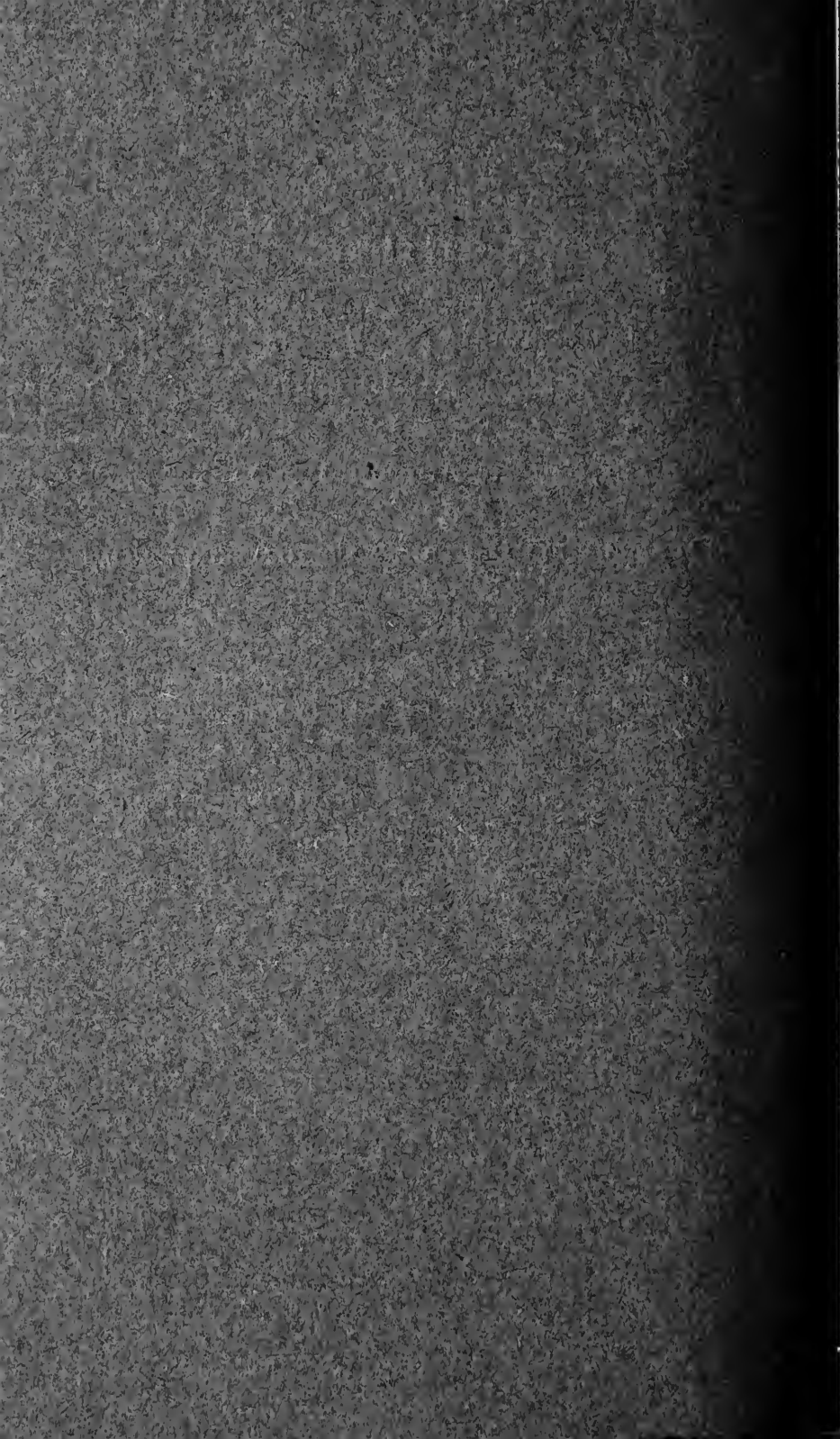
**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN
DIVISION**

**REPLY OF THE UNITED STATES OF AMERICA TO BRIEF OF
INTERVENING APPELLEE, STATE OF WASHINGTON**

FILED

MAR 13 1956

PAUL P. O'BRIEN, CLERK



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In the United States Court of Appeals for the Ninth Circuit

No. 14714

UNITED STATES OF AMERICA, APPELLANT

v.

AHTANUM IRRIGATION DISTRICT, A CORPORATION, ET AL.,
APPELLEES

*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN
DIVISION*

REPLY OF THE UNITED STATES OF AMERICA TO BRIEF OF
INTERVENING APPELLEE, STATE OF WASHINGTON

FOREWORD

Answer has been made by the United States of America in its reply brief to the Appellees to virtually every point presented by the brief of Intervening Appellee. Brief reply, however, to some of the issues presented or ignored by Intervener will be made.

I. The United States of America seeks only to have its rights in Ahtanum Creek quieted—not to deprive anyone of his rights

It is admitted by Intervening Appellee that “the treaty of 1855” reserved “some waters of the Ah-

tanum Creek.”¹ In the light of that admission the question is presented: What is the basis then for the judgment of dismissal—how may it be justified?²

Intervener offers no authority to support that judgment of dismissal, asserting, however, in some manner the United States of America seeks to deprive the landowners north of Ahtanum Creek of their rights. That statement is incorrect. All that the United States of America proposed—adhering strictly to law and equity—is to afford the Yakima Tribe of Indians their day in court, testing the title of the respective parties to the invaluable rights in Ahtanum Creek. Certainly the State of Washington as Intervener would have no objection to that orderly procedure.

II. Intervener cites no authority in support of its contention that subordinate officials of the Department of the Interior by signing the alleged agreement of 1908 could give away invaluable rights to the use of water to settle private litigation³

Affirmative testimony by one of the lawyers for defendants below discloses that the alleged agreement of 1908 was in settlement of the case of *Munn v. Redman*.⁴ That suit was not against the United States of America. Neither Appellees nor Intervener offer a scintilla of authority which would support

¹ Brief of Intervening Appellee, page 6.

² Please refer to Reply Brief for the United States of America, Part III in which Appellees' admissions are discussed.

³ Brief of Intervening Appellee, State of Washington, pages 7-12, 15-18.

⁴ Please refer to Reply Brief for the United States of America, Part IV, disclosing Invalidity of alleged agreement of 1908.

granting away 75% of the water of Ahtanum Creek, thus invading the rights of the Indians, in settlement of that private litigation. It is respectfully submitted, their position may not be supported.

III. Unconscionable waste of water from Ahtanum Creek by appellees belies intervener's complaint of water shortage

Waste of water was proved by the United States of America;⁵ wasteful practices, diversions without controls admitted by Appellees⁶ yet Intervener complains of a shortage of water.⁷ In the semiarid West the waste of water may not be tolerated. However, the unchallenged record discloses that Appellees have wasted and continue to waste the invaluable and admittedly short supply of water of Ahtanum Creek. Unless and until the Appellees prove that they are husbanding the water available to them rather than wasting it; are applying it in a manner requiring the highest duty, they are in a poor position to complain about a water shortage.

Rather than dismissing the complaint and cause, it is respectfully submitted, the court below might well have entered a decree which would eliminate the unconscionable waste of water by Appellees and enjoined their wasteful practices,⁸ to the end that the invaluable water now wasted would be beneficially used. That grave need in itself fully justifies reversal.

⁵ Brief for the Appellant, United States of America, page 58.

⁶ Brief of Appellees, page 59.

⁷ Brief of Intervening Appellee, State of Washington, page 12.

⁸ Brief of Appellees, page 59.

IV. Intervener makes no mention of the fact that it was admitted to the Union and adopted its Constitution subject to this proviso: "Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States * * *"

Intervener asserts: "The State of Washington, exercising its *jurisdiction* to adjudicate property rights of all persons within its boundaries adjudicated, limited and fixed the rights of all parties to the waters of Ahtanum Creek * * *.

"By this decree the United States was recognized to be the owner of 25 percent of the waters of said creek for the benefit of the owners of land on the reservation south of the creek." ⁹

It is denied that the Intervener has "jurisdiction" in the Yakima Reservation or could adjudicate rights in that Reservation. Both the Constitution of the State of Washington and the Enabling Act provide that: "Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States * * *." ¹⁰ This Honorable Court involving the identical provision declared in these terms that State statutes respecting rights to the use of water did not apply within Indian Reservations: "* * * the Montana statutes regarding water rights are not applicable, because Congress at no time has made such statutes controlling in the reservation. In fact, the Montana enabling act specifically provided that Indian lands, within the limits of the state, 'shall remain

⁹ Brief of Intervening Appellee, State of Washington, page 14.

¹⁰ Brief for the Appellant, United States of America, page 42.

under the absolute jurisdiction and control of the Congress of the United States'. 25 Stat. 676, sec. 4." ¹¹

In the light of that express decision by this Honorable Court, Intervener's assertion that the State of Washington had "jurisdiction" is clearly erroneous. Equally clear is the fact that as the United States of America reserved for itself, and was accorded by Washington, exclusive jurisdiction over the lands in question, there is no denial of the latter's sovereignty as is asserted.¹² Those same errors—reversible errors it is respectfully submitted—were made by the court below.

V. Intervener ignores the decisions of its own highest court, the Nation's highest court and this Honorable Court when it declares that the United States of America is bound by a decree in a proceeding in which it did not appear

It is admitted by all parties that the United States of America did not appear in the State court proceedings.¹³ The mere reference to the unauthorized agreement of 1908 in the decision could not on any basis known to the law bind the United States of America. Certainly the Supreme Court of Washington has declared that parties who are not before a court in a water adjudication suit are not bound by the decree.¹⁴ Though the Washington cases are referred to in the brief of the United States of America,

¹¹ *United States et al. v. McIntire et al.*, 101 F. 2d 650, 654 (CA 9, 1939).

¹² Brief of Intervening Appellee, State of Washington, page 18.

¹³ *In re Water Rights in Ahtanum Creek*, 139 Wash. 84, 245 Pac. 758, 760 (1926).

¹⁴ Brief for the Appellant, United States of America, page 55.

Intervener neither distinguishes them nor for that matter alludes to them. Under the circumstances, therefore, there is no basis whatever for asserting that the United States of America could be bound by a decree in the cause to which it was not a party.

Wholly aside from the fact that the United States of America did not appear in the case is this additional fact:

The United States of America could not appear as it had not waived its sovereign immunity from suit.¹⁵

¹⁵ Please refer to Brief for the Appellant, United States of America, page 54.

CONCLUSION

In the light of the numerous errors committed by the court below this Honorable Court is respectfully requested to reverse the judgment of dismissal and to direct the entry of a judgment in favor of the United States of America.

UNITED STATES OF AMERICA,

s/ J. Lee Rankin

J. LEE RANKIN,
Assistant Attorney General.

s/ David R Warner

DAVID R. WARNER,
Attorney, Department of Justice.

s/ William H Veeder

WILLIAM H. VEEDER,
Attorney, Department of Justice.

Dated: *Mar 12 1956*



No. 14714

**In the United States Court of Appeals
for the Ninth Circuit**

UNITED STATES OF AMERICA, APPELLANT

v.

**AHTANUM IRRIGATION DISTRICT, A CORPORATION, ET AL.,
APPELLEES**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN
DIVISION**

**REPLY BRIEF FOR THE UNITED STATES OF AMERICA,
APPELLANT**

FILED

PAUL P. O'BRIEN, CLERK



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**REPLY BRIEF FOR THE UNITED STATES OF AMERICA,
APPELLANT**

The United States of America replies to the response of Appellees and emphasizes their failure to support the judgment of dismissal entered by the court below.

FOREWORD

After a full trial on the merits the trial court entered a judgment of dismissal, declaring:

the above entitled [1] action and the [2] complaint * * * is hereby dismissed on its merits.¹

From that judgment of dismissal the United States of America prosecutes this appeal, formulates its specifications of error, tenders both its opening and this reply brief. Yet Appellees [a] fail to support—indeed fail to mention—the dismissal of the com-

¹ R. 166 and 167.

plaint; [b] ignore entirely the proof which they stipulated into the record of the claims of the United States of America, all as set forth in Appendices A and B of the opening brief; [c] do not distinguish between rights to the use of water title to which the United States of America seeks to quiet, and the corpus of the water of the stream in question, a fatal error made by the trial court.

In the paragraphs which succeed Appellees' failure to support the judgment of dismissal entered by the court below will be reviewed.

I. Plain and Serious Error Was Committed by the Court Below When It Dismissed the Complaint in This Cause

No effort is made by Appellees to support the judgment of dismissal by the court below. Under the circumstances they had no alternative for the complaint filed by the United States of America set forth each and every averment requisite to state a claim for the relief for which it prays.² Washington's Supreme Court has declared:³ "The complainant * * * alleged ownership * * * of the first right to divert water. * * * it challenged the defendants to set up any claims they had against such rights. In actions to quiet title to real estate, where such general allegations of ownership are made, it is undoubtedly the duty of a defendant to set up any claim he may

² *Ely v. New Mexico & Arizona R. R. Co.*, 129 U. S. 291, 293 (1889).

³ *Spring Hill Irr. Co. v. Lake Irr. Co.*, 42 Wash. 379, 382, 85 Pac. 6, 7 (1906).

have of either a legal or equitable nature, * * *.”⁴
 This Honorable Court is respectfully petitioned to examine the complaint⁵ filed by the United States of America in the light of the cited authorities. There the sufficiency of the complaint will be revealed and the reversible error by the court below in dismissing it is emphasized.

II. Dismissal of This Action Violates Rule 15 (b) of the Federal Rules of Civil Procedure by Reason of (A) the Comprehensive Pre-Trial Order Entered by the Court Below; (B) the Full Proof of the Claims of the United States of America Based on Evidence Introduced Without Objection

There was formulated by the parties; entered by the trial court a comprehensive Pre-trial Order—likewise ignored by Appellees.⁶ Stipulated there are the “Agreed Facts”;⁷ Contentions of the Parties;⁸ Questions of Law.⁹ Likewise stipulated into the record were the exhibits of the United States of America, including Appendices A and B of its opening brief.¹⁰ On that background this Honorable Court is respectfully referred to the opening brief of the United States of America,¹¹ in which the evidence introduced

⁴ Please refer to Brief for the Appellant, United States of America, page 28 et seq.

⁵ R. 3 et seq.

⁶ R. 123 et seq.

⁷ R. 123 et seq.

⁸ R. 129 et seq. Pre-trial Statement by Brown and Olson, R. 100.

⁹ R. 143 et seq.

¹⁰ R. 99.

¹¹ Brief for the Appellant, United States of America, page 3 et seq.

without objection is summarized, and petitioned to consider this question:

On what grounds in the light of the evidence introduced by the United States can the dismissal by the lower court be justified?

A summary of that evidence, set forth in the opening brief of the United States of America,¹² discloses every element requisite for the entry of a decree. Particular reference is made to that phase of the analysis of Appendices A and B of that brief which reveals in great detail the irrigated and irrigable acreages for which the rights to the use of water are claimed.¹³

Alluding to the inquiry above set forth the response is respectfully suggested—It is entirely without justification. Supporting that response are the authorities which are now reviewed.

It has been authoritatively declared: “* * * the parties may, by express consent, or by the introduction of evidence without objection, amend the pleadings at will.”¹⁴ “* * * Express consent may be found in a stipulation or pretrial order. Implied consent usually is found where one party raises an issue material to the other party’s case, or where evidence is introduced without objection. * * * It should be noted that Rule 15 (b) is not permissive in terms:

it provides that issues tried by express or implied consent shall be treated as if raised by

¹² Brief for the Appellant, United States of America, page 21.

¹³ Brief for the Appellant, United States of America, page 23.

¹⁴ 3 Moore’s Federal Practice, 846.

the pleadings. The court **must** make findings on such issues, * * *.”¹⁵ [Emphasis supplied.]

This succinct statement fully supported by the abundance of authority reveals the error in dismissing the complaint and action:

* * * Issues not raised by the pleadings which are tried by the express or implied consent of the parties, are treated in all respects as if raised in the original pleadings. A party impliedly consents to the introduction of issues not raised in the pleadings by failure to object to the admission of evidence relating thereto * * *.”¹⁶

It thus is respectfully concluded: If the complaint was not sufficient, which is denied, any deficiency in it was cured by the Pre-trial Order and the proof which was introduced without objection. Any doubt respecting the error of dismissal by the trial court will be dispelled by the admissions of Appellees which are now considered.

III. Admissions by Appellees Disclose Reversible Error by Court Below When it Entered Judgment of Dismissal

Appellees admit that the United States of America is “entitled” to “25% of the flow” of Ahtanum Creek.¹⁷ Yet the court below dismissed the complaint and cause, refusing to adjudicate to it any rights in

¹⁵ 3 Moore’s Federal Practice, 847, 848; Please refer to 6 Cyc. Fed. Proc., 3d ed., Sec. 18.34.

¹⁶ Barron and Holtzoff, Federal Practice and Procedure, pp. 917-918.

¹⁷ Brief of Appellees, page 37.

the stream. However, before proceeding, let this fact be respectfully emphasized—Appellee's admission is based upon the alleged agreement of 1908. The United States of America asserts that alleged agreement is null and void and of no force and effect.

Having admitted that the United States of America is entitled to water from the stream, Appellees refute entirely the judgment of dismissal for they admit that the United States of America, based on the evidence adduced at the trial on the merits, is entitled to a decree—not to have its complaint and action dismissed. Reversible error respecting the judgment of dismissal is thus patent for:

If a party is entitled to any relief under the facts as established by the pleadings or proof, the claim will not be dismissed simply because complainant has erred as to legal theory and is not entitled to the relief prayed for.¹⁸

This equally authoritative statement in the light of Appellees' admissions further reveals the grave error committed by the court below in dismissing the cause: "If a party has proven a claim for relief, the court will grant him that relief to which he is entitled on the evidence regardless of the designation of the claim or the prayer for relief."¹⁹

By their admission that the trial court erred when it entered its judgment of dismissal and should have granted relief to "25%" of the "flow" of Ahtanum Creek, Appellees present for determination the ques-

¹⁸ 6 Moore's Federal Practice, 1208.

¹⁹ Barron & Holtzoff, Federal Practice and Procedure, page 19.

tion of the validity of the alleged agreement upon which they predicate their admission.

IV. Void and of No Force and Effect Is the Only Proper Reference to the Alleged Agreement of 1908 Which purported to Give Away Federal Property to Settle the Private Litigation of *Munn v. Redman*

“* * * the case of *Munn v. Redman, et al.*, begun * * * in the year 1906,” was concluded by “* * * a compromise agreement of 1908,”²⁰ is the statement made in the trial of the case by John H. Lynch, one of the counsel representing the defendants, there. Thus the alleged agreement of 1908 purported to settle the case of *Munn v. Redman*,²¹—an action not against the United States of America but a subordinate official in the Department of the Interior. Appellees recognize that fact.²² Wholly aside from the other objections to the validity of that alleged agreement this fact stands out clearly:

Invaluable rights to the use of water could not be given away by the Secretary of the Interior to settle an action against one of his subordinates. The United States Attorney's participation in the matter (he did not sign the alleged agreement) arose from the fact that an official was being sued, not because the action was against the Federal Government.²³

²⁰ United States of America, Plaintiff's Exhibit No. 11-75; R. 547 et seq.; Testimony of John H. Lynch.

²¹ Brief for the Appellant, United States of America, page 9 et seq.

²² Brief of Appellees, pages 5, 6, 7, 8, and 9.

²³ *United States v. Dollar*, 196 F. 2d 551, 554 (C. A. 9, 1952).

That conclusion stems from the principle of law that a judgment in a case against an official of the United States in actions of the nature of *Munn v. Redman* are

not res judicata against the United States.²⁴

Based on numerous authorities this statement is set forth in the opening brief of the United States of America: "Few principles of law are more basic than that the Attorney General of the United States is the only one empowered to represent the United States in litigation and to compromise suits of the character here involved."²⁵ Noteworthy, moreover, is the fact that the Attorney General himself,—assuming he had participated in *Munn v. Redman*—could not have given away property of the United States of America to settle a claim against an individual. No official of the United States of America is thus empowered, absent express Congressional authority.²⁶

Too great emphasis may not be placed upon this fact: No authorities are cited by Appellees—there is none—which will support the proposition that invaluable rights to the use of water of the United States of America may be given away for the purpose of settling private litigation of the character of *Munn v. Redman*. Accordingly, the alleged agree-

²⁴ *Land v. Dollar*, 330 U. S. 731, 736 (1946). Please refer to *Larson v. Domestic & Foreign Corp.*, 337 U. S. 682, 686 et seq. (1948).

²⁵ Brief for the Appellant, United States of America, page 43.

²⁶ *Utah Power and Light Co. v. United States*, 243 U. S. 389, 408 (1916).

ment, it is respectfully submitted, is null and void and of no force and effect.

V. Recitation by Appellees of Duties and Responsibilities of Department of the Interior to Protect Properties of Indians Strikes Down Rather Than Supports Alleged Agreement of 1908

* * * not the exercise of guardianship or management, **but confiscation**

is the apt description by our Highest Court in regard to contentions there advanced which are strikingly similar to those of these Appellees.²⁷ Thus there is no basis for the assertion that the power to manage is synonymous with the power to deprive the Indians of their properties by the alleged agreement of 1908.²⁸ Appellees cite no authority whatever to support the attempted and wholly unauthorized relinquishment of the invaluable property of the Yakima Indians which the United States of America seeks here to protect.²⁹ A cursory review—a searching analysis of them will not disclose a scintilla of authority pursuant to which the Secretary of the Interior or any of his subordinates could grant to the users of Ahtanum Creek, as was attempted, 75% of the flow of the stream. That conclusion is, of course, buttressed many times over when consideration is given to the fact that those officials of the Department of the Interior, who nego-

²⁷ *United States v. Shoshone Tribe of Indians*, 304 U. S. 111, 116 (1937).

²⁸ Please refer to Brief of Appellees, page 16 et seq.

²⁹ Please refer to Brief of Appellees, pages 16 and 17. Note: Page 18 of Appellees' Brief sets forth a footnote the source of which is undisclosed.

tiated the alleged agreement, were purporting to settle the case of *Munn v. Redman*. On repeated occasions the Supreme Court has declared that officials may not dispose of the property of the United States of America without Congressional authority, which is entirely absent in this case.

VI. Congress Alone Has the Power To Dispose of the Properties of the United States of America—There Being No Authority for the Alleged Agreement of 1908 Purporting To Convey 75% of the Flow of Ahtanum Creek It Is Void

“Power to release or otherwise dispose of the rights and property of the United States is lodged in the Congress by the Constitution. Art. IV, § 3, Cl. 2. Subordinate officers of the United States are without that power, save only as it has been conferred upon them by Act of Congress or is to be implied from other powers so granted.”³⁰ From the decisions of the Supreme Court it is clear beyond question that the subordinate officials of the Department of the Interior—indeed the Secretary of that Department—may not grant away the property of the United States of America without Congressional authority. Appellees cite no authority, express or implied, to warrant the claim that the alleged agreement of 1908 could grant away from the Indians 75% of the flow of a stream which constitutes the source of their water supply.

³⁰ *Royal Indemnity Co. v. United States*, 313 U. S. 289, 294 (1940); *Utah Power and Light Co. v. United States*, 243 U. S. 389, 409 (1916); *United States v. California*, 332 U. S. 19, 27 (1946).

VII. Congress Refused to Approve, Confirm, Ratify Alleged Agreement of 1908—Appellees Make No Reply to That Fact Though It Is Emphasized in Brief of the United States of America

Recognizing the invalidity of the alleged agreement of 1908, Congressional approval of it was sought.³¹ Although extensive hearings were held in connection with it, the bill did not pass Congress.

Congress having refused to approve, confirm, ratify, or establish the alleged agreement of 1908, it is respectfully submitted that it is null, void and of no force and effect; that the Appellees acquired no rights under it.

VII. The Equities are Entirely With the United States of America—Laches and Estoppel Have No Application to It—Could Not Lend Validity to the Void Agreement of 1908

There being no authority in the subordinate officials of the Department of the Interior to give away the Indians' rights to the use of water in Ahtanum Creek, Appellees seek to invoke the doctrine of laches and estoppel against the National Government.³² Mr. Justice Black in these succinct terms reveals their error: "The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Govern-

³¹ Brief for the Appellant, United States of America, page 11.

³² Brief of Appellees, page 31.

ment to lose its valuable rights by their acquiescence, laches, or failure to act.”³³

As if directed to Appellees’ assertion now being considered, the Highest Court on an earlier occasion declared: “Of this [a similar contention] it is enough to say that the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit. * * * As a general rule laches or neglect of duty on the part of officers of the Government is no defense to a suit by it to enforce a public right or protect a public interest.”³⁴

Identically the same just principles apply whether the lands and property of the National Government are involved or those of its Indian wards. In a case very closely akin to this, in which an effort was made to deprive the Indians of invaluable property, our Highest Court declared: “No conduct of theirs [officials of the Department of the Interior] can estop the government from asserting its rights to recover for timber cut beyond the quantity and quality specified in the contract. * * * We are therefore of opinion that the defendants cannot take refuge under the consent or acquiescence of the government agent in the disregard of these contracts.”³⁵

In the light of that decision this Honorable Court is respectfully petitioned likewise to deny to these

³³ *United States v. California*, 332 U. S. 19, 40 (1946).

³⁴ *Utah Power and Light Co. v. United States*, 243 U. S. 389, 408, 409 (1916).

³⁵ *Pine River Logging Co. v. United States*, 186 U. S. 279, 291 (1901).

Appellees refuge behind the doctrine of laches and estoppel which should only be invoked in the aid of equity and good conscience. An analysis of Appendix C of the opening brief of the United States of America will reveal that the United States of America has acted since 1906 with restraint and understanding seeking at all times to settle amicably this protracted controversy.

It is concluded, based upon the law and equally upon the facts, that Appellees are not in a position to rely upon the equitable doctrines to which they refer.

Finally in that regard Appellees state the United States of America, when representing the Indians, is proceeding "in a proprietary capacity."³⁶ That statement ignores the fundamental character of our general Government, which, having only delegated powers, may act only in its capacity of a sovereign.³⁷

IX. Invalid Agreement of 1908 Purported to Relate to Approximately 1,200 Acres of Indian Lands, 4,000 Acres North of the Stream—Involved in This Litigation Are 5,000 Acres of Indian Lands, 10,000 Acres North of the Stream—Dismissal Ignores That Fact

It is denied that the alleged agreement of 1908 has any validity. Yet if it had, it related to only 1,200 acres of Indian land, 4,000 acres of white land.³⁸ Claimed rights to the use of water for approximately

³⁶ Brief of Appellees, page 31.

³⁷ *Federal Land Bank v. Bismarck Lumber Co.*, 314 U. S. 95, 102 (1941).

³⁸ Brief for the Appellant, United States of America, page 32 et seq.; see also Brief of Appellees, pages 11, 21.

5,000 acres of Indian land and 10,000 acres north of the stream are here involved.

It is abundantly manifest that assuming that the alleged agreement of 1908 had any validity, it did not pertain to the additional acreage. Equally manifest is the fact that the court below should have entered a decree respecting those rights.³⁹ Thus the judgment of dismissal for this additional reason is plainly in error and should be reversed.

X. There Has Never Been Compliance With the Alleged Agreement of 1908—Appellees Readily Admit That Fact

Appendix B⁴⁰ of the opening brief of the United States of America reveals this undisputed fact:

There never has been compliance with the alleged agreement of 1908.

Reference in that connection is made to the percentage of diversions contained in that Appendix. There is undisputed and unchallenged proof that historically the United States of America on behalf of the Indians has consistently diverted far in excess of the 25% of the "flow" which the alleged agreement purported to fix as the Indian share of Ahtanum Creek.

This candid statement of Appellees reveals their failure to comply with the alleged agreement of 1908:

Open canals, old river beds and other water courses were used in 1908 [to divert and distribute water north of Ahtanum Creek] when

³⁹ Federal Rules of Civil Procedure, Rule 54 (c).

⁴⁰ Brief for the Appellant, United States of America, page 79 et seq.

the agreement was made. They were used in 1925 when the State adjudication took place.⁴¹

They are used today. Yet the alleged agreement specifically provides: “* * * wherever water is diverted from the main channel of Ahtanum Creek * * * a substantial headgate shall be installed and maintained * * *.”⁴² Two things are clear [1] Evidence admitted into the record without objection⁴³ proves the United States of America has consistently diverted water from Ahtanum Creek far in excess of the 25% limitation contained in the alleged agreement; [2] Appellees admit that they have not in the approximately half century since the alleged agreement was entered into, complied with it. Proof in the record: appellees’ admission that there has never been compliance with the alleged agreement of 1908, disclose the error of the assertions by Appellees.⁴⁴

Wholly aside from the illegality of the alleged agreement of 1908 the failure of compliance with it by all concerned underscores the error of the court below in dismissing the cause.

⁴¹ Brief of Appellees, page 59.

⁴² Alleged Agreement of 1908, R. 29, Article 5.

⁴³ Appendix B, page 79, Brief for the Appellant, United States of America.

⁴⁴ Brief of Appellees, page 26.

XI. Fatal and Reversible Error of Court Below and Appellees Is Failure To Distinguish Between Rights to the Use of Water and the Flow of Ahtanum Creek; Possession of Rights Is Not Condition To Bring Suit To Quiet Title

Involved here are rights to the use of water, an interest in real property:
Not the "flow" or "corpus" of the waters of Ahtanum Creek

This is a quiet title action.⁴⁵ Involved are rights to the use of water which are interests in real property.⁴⁶ Washington's Supreme Court has declared: "* * * water rights for use upon the land are considered appurtenant to the land and, therefore, realty, is declared by our statutes and prior decisions of this court."⁴⁷ This authoritative statement on the basic proposition emphasizes the error of the court below in dismissing the United States of America: The error which pervades the brief of Appellees "* * * a water right [that which is here involved], then is a property right, independent in itself * * * Before diversion the appropriator acquires no title to the *corpus*, or 'the very body of the water,' while it is still flowing naturally in the stream. * * * No title to the *corpus* of the water itself * * * could be granted."⁴⁸ Adopting the error of the court below Appellees repeat that there has been a failure "to establish possession" of the waters.⁴⁹ Simply stated, short of placing the corpus of the water in a container, ditch

⁴⁵ Brief for the Appellant, United States of America, page 50 et seq.

⁴⁶ Brief of Appellant, United States of America, page 51.

⁴⁷ Brief for the Appellant, United States of America, page 46 and cases cited.

⁴⁸ 2 Kinney on Irrigation and Water Rights, 2d ed., pages 1337-1338.

⁴⁹ Brief of Appellees, page 57.

or reservoir, it is not subject to "possession." That is not the issue, rather the issue here is the title to the right to divert and to apply the waters of Ahtanum Creek to a beneficial use. Based on the record the United States of America respectfully submits that it is entitled to a decree quieting its title, on behalf of the Yakima Indians, to the rights claimed by it in Ahtanum Creek.

"Possession" is not a condition precedent to quieting title to rights to the use of water

This statement by Washington's Highest Court brings to focus the grave—it is respectfully submitted, reversible—error of the court below and of Appellees: "* * * we conclude that we are not here dealing with water as personal property * * * but rather with an alleged water right as real property and the [quiet title] action was maintainable by the parties."⁵⁰ That same Court reveals the error before this Court by declaring that: "the statute provides * * * that any person, having a valid, subsisting interest in real property and a right to the possession thereof, may recover the same by action, and may have judgment in such action quieting plaintiff's title. Under this section a person holding the legal title to the real estate with the right of possession may maintain an action to quiet his title."⁵¹ Proof of the rights to the use of water—not possession—was the burden of the United States of America which was

⁵⁰ Brief for the Appellant, United States of America, page 46.

⁵¹ Brief for the Appellant, United States of America, page 47.

fully sustained by it through evidence introduced into the record without objection.⁵²

XII. Winters Doctrine⁵³ Is Recognized by Appellees—Every Element of Right Has Been Proved to Bring the Claims of the United States of America Within the Purview of That Doctrine

Reference is again made to the opening brief of the United States of America.⁵⁴ With great care there has been proved full title to every parcel of land; the ditches which deliver to the lands the waters which are available to those lands; the irrigated and irrigable acreages—duty of water—every element requisite to the formulation of a decree. With regard to that statement this Honorable Court is again respectfully requested to consider Appendices A and B. What more could be proved? Appellees attempt in some manner to distinguish this case from the *Winters* Case⁵⁵ and others which protect the rights to the use of water of the Indians under the circumstances here presented.⁵⁶ There they state: “The reasonable needs of the Indians have been more than satisfied.” Refuting that unsupported and incorrect statement is explicit proof by unchallenged evidence introduced in the record.⁵⁷ Fully support-

⁵² Please refer to Appendices A, B and C of Brief for the Appellant, United States of America, setting out part of record and references to exhibits.

⁵³ *Winters v. United States*, 207 U. S. 564 (1908).

⁵⁴ Brief for the Appellant, United States of America, pages 7 et seq.

⁵⁵ Please refer to Brief for the Appellant, page 33.

⁵⁶ Brief of Appellees, page 44.

⁵⁷ Brief for the Appellant, United States of America, page 8.

ing the position of the United States of America is the decision in the *Walker Case*.⁵⁸ There this Court specifically recognized the doctrine of implied reservation, declaring: "We hold that there was an implied reservation of water [for the Indians] to the extent reasonably necessary to supply the needs of the Indians. * * * The extent to which the use of the stream might be necessary could only be demonstrated by experience."⁵⁹ That statement is precisely in point. Every acre of land has been allotted (of the 5,000 acres approximately 900 have been transferred away by the Indians); the necessity of water proved and in fact agreed to in the Pre-trial Order. Though water was used from Ahtanum Creek as early as 1847 for irrigation, the Indian uses increased steadily as the record discloses.⁶⁰ The ditches long used to irrigate the lands were consolidated when the present system was constructed.⁶¹ That construction was undertaken in the summer of 1908 at the same time the invalid agreement of the same year was executed. As the exhibits reveal, the work was diligently prosecuted to completion in the year 1915. Also these facts are proved—they are in the "Agreed Facts" set forth in the Pre-trial Order.

Under the circumstances it is respectfully submitted that judgment for the full relief prayed for by the

⁵⁸ *United States v. Walker River Irrigation District, et al.*, 104 F. 2d 334 (C. A. 9, 1939).

⁵⁹ *Ibid.*, 104 F. 2d 334, 339, 340 (C. A. 9, 1939).

⁶⁰ Brief for the Appellant, United States of America, Appendices A and B.

⁶¹ Please refer to United States of America, Plaintiff's Exhibit 5-b; also Exhibit 5-a.

United States of America should be granted; *a fortiori* the judgment of dismissal should be reversed.

XIII. Miscellaneous Errors Contained in Brief of Appellees

a. Rights in a stream include rights in the tributaries to it

Appellees urge that tributaries outside of the reservation contribute to Ahtanum Creek.⁶² A more barren right is difficult to perceive than a right in a main stream which did not inhere in the tributaries. Manifestly if rights in the tributaries could be exercised without recognizing main-stream rights the latter would be valueless.⁶³ This aphorism discloses the Appellees' error in the matter: "Tributary waters, branches, are inseparable parts of the main stream, and with it are subject to common appropriation and control insofar as reasonably necessary in irrigation as in navigation. The first may not be diverted to the impairment of prior rights in the last. The proprietor of the trunk owns the branches, and safety of the first requires protection of the last."⁶⁴

b. The waters from the Klickitat River are not available for the Indian lands here involved

Reference is made by Appellees to the Klickitat River Project. That transmountain diversion project was investigated but was never approved.⁶⁵ Appellees fail to explain why the Yakima Indians should be forced to divert water from another watershed

⁶² Brief of Appellees, page 51.

⁶³ *Conrad Investment Co. v. United States*, 161 Fed. 829 (C. A. 9, 1908).

⁶⁴ *Dern v. Tanner*, 60 F. 2d 626, 628 (D. C. D. Mont. 1932).

⁶⁵ Brief for the Appellant, United States of America, page 34.

when their rights in Ahtanum Creek are adequate if Appellees desist from interfering with them.

c. Sovereign immunity from suit precluded the United States of America from appearing in the State adjudication—Appellees err in declaring the United States of America could appear

Error is expressed by the court below and by Appellees in regard to the State proceedings. The United States of America did not appear in that cause and could not be made a party to it; could not appear by reason of its sovereign immunity from suit.⁶⁶

d. Erroneous statements are made by appellees respecting congressional investigation of 1913

Appellees refer to a Congressional investigation respecting the welfare of the Yakima Tribe of Indians. They refrained from citing the source upon which they rely. Apparently the one to which they allude was held August 30, 1913.⁶⁷ This Honorable Court is respectfully requested to consider that document which Appellees state "necessarily includes Ahtanum Creek." There was no effort to resolve the issue here presented and Appellees err in representing that it does.

CONCLUSION

In the light of the numerous errors committed by the court below this Honorable Court is respectfully requested to reverse the judgment of dismissal and to

⁶⁶ Brief for the Appellant, United States of America, page 54; See also *Randolph Land & Livestock Company v. United States*, 2 Utah 2d 208, 271 P. 2d 846 (1954).

⁶⁷ Senate Document No. 337, 63d Congress, 2d Session.

direct the entry of a judgment in favor of the United States of America.

UNITED STATES OF AMERICA,

S/ J. Lee Rankin
J. LEE RANKIN,
Assistant Attorney General.

DAVID R. WARNER,
Attorney, Department of Justice.

S/ William H. Veeder
WILLIAM H. VEEDER,
Attorney, Department of Justice.

DATED: *Mar 9 1956*

In the
United States
Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

v.

AHTANUM IRRIGATION DISTRICT, a cor-
poration, et al., *Appellees.*

} No. 14714

APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE EASTERN
DISTRICT OF WASHINGTON,
SOUTHERN DIVISION

BRIEF OF INTERVENING APPELLEE,
STATE OF WASHINGTON

DON EASTVOLD,
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Assistant Attorney General,

*Attorneys for Intervening Appellee,
State of Washington.*

Temple of Justice, Olympia, Washington

STATE PRINTING PLANT, OLYMPIA, WASH.

FILED

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United States
Court of Appeals
For the Ninth Circuit

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Temple of Justice, Olympia, Washington

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In the
United States
Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA, <i>Appellant,</i>	}	No. 14714
v.		
AHTANUM IRRIGATION DISTRICT, a corporation, et al., <i>Appellees.</i>		

BRIEF OF INTERVENING APPELLEE,
STATE OF WASHINGTON

APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE EASTERN
DISTRICT OF WASHINGTON,
SOUTHERN DIVISION

STATEMENT OF POSITION OF THE STATE
OF WASHINGTON

The State of Washington has secured permission to intervene in this action in its sovereign capacity and to protect vested water rights of certain of its citizens which have been adjudicated in its courts.

The opinion of the trial court reported in 124 F. Supp. 818 contains an exhaustive and complete

statement of this case. For the convenience of the court the entire opinion is printed as Appendix A to this brief beginning on page 19. The State of Washington feels that the learned trial court was correct in all particulars and submits that the judgment of dismissal should be affirmed.

The state approves and adopts the points, arguments and authorities contained in the brief of appellee, Ahtanum Irrigation District.

Appellant, United States of America, seeks to deprive patentees of lands lying north of Ahtanum Creek of water rights which they have enjoyed for over half a century, and in so doing seeks to repudiate or disregard a solemn agreement of May 9, 1908 (R. 128).

The trial court correctly held that this could not be done.

CONCISE STATEMENT OF THE CASE

The trial court held that as a result of the Treaty of 1855, there was a reservation of the use of some waters of the Ahtanum Creek (Appendix A, p. 38), although only the right of fishing was expressly reserved (R. 20).

While this reservation was extremely limited, the court was confronted with a solemn agreement entered into on May 9, 1908, with the authority and approval of the secretary of the interior who was authorized to limit the water rights of Indians on the reservation.

THE AGREEMENT OF 1908 WAS VALID AND FAVORABLE TO INDIAN CLAIMANTS

A dispute arose between the white citizens, to whom lands lying north of Ahtanum Creek had been patented and who had acquired vested rights to practically all of the water in Ahtanum Creek, and the Indian Service when, about 1904, the Indian Service started what is now referred to as the main ditch which would deprive the white settlers of the ancient water rights to which they claimed to be entitled (R. 415).

An action was started in the state courts for the purpose of settling the division of water between the Indians, whose reservation ran along the south side of Ahtanum Creek, and the white settlers on the north side of the creek (Ex. 8).

The Indian Service engineer was a defendant in this action. He was represented by the United States attorney at Spokane, who appeared in the action but suggested the necessity of a Federal court proceeding (Ex. 11-113 "I").

A form of bill in equity to be filed in the Federal court was approved by the attorney general of the United States on July 30, 1907 (Ex. 11-14). On August 12, 1907, the United States attorney at Spokane received a wire from the department of justice to withhold the filing of the government's proposed bill in equity (Ex. 11-17).

At this point the Honorable James R. Garfield,

secretary of the interior, requested the department of justice to hold the matter in abeyance pending a settlement thereof (Ex. 11-113 "A"). Secretary Garfield made a trip to Yakima and, after conferring with all parties, became thoroughly convinced that a permanent settlement of the controversy should be made by agreement, rather than litigation (R. 546-548).

He therefore sent chief engineer Code of the Indian Service to the Yakima reservation with instructions to secure an agreement for a division of the flow of Ahtanum Creek based upon one-third to the reservation side and two-thirds to the nonreservation side, but if that basis could not be secured, then the agreement should be based upon the amount of irrigated acreage on both sides of the creek (Ex. 11-23).

It was the position of the white water users at the meetings which ensued that the water of the creek should be allotted in accordance with priority of appropriations, in which event the Indians on the reservation side would have received but a very small share representing certain rights which had accrued to some of the riparian Indian ranches in the narrow strip of bottom land adjoining the main channel. As a matter of compromise it was finally agreed that the white water users to the north of Ahtanum Creek should give up one-fourth of the flow of the stream to the Indians. This was accepted by the government and the Indian representatives and became the basis of the agreement of 1908.

As a matter of fact, this settlement was very advantageous to the Indians. At the time of negotiations they had 1,224 acres of reservation land under cultivation and expected to cultivate about 1,500 acres. The white settlers claimed that there had been at least 7,000 acres of land north of the creek reclaimed and irrigated (R. 554). Chief engineer Code's report of October 17, 1907, to the secretary indicated that the irrigated acreage of Indian lands south of the creek was 1,500 acres, and that the non-reservation irrigated acreage north of the creek was 5,500 acres (Ex. 11-6). Nevertheless, the agreement was consummated on the basis of 25 per cent of the flow of the creek to the Indian lands south of the creek and only 75 per cent of the flow of the creek to the nonreservation lands north of the creek.

This agreement entered into in the utmost good faith was ultimately approved by secretary of the interior Garfield and the commissioner of Indian affairs (Exs. 11-25 and 11-26), but only after powers of attorney as specifically required by secretary Garfield, which would authorize the signing of the agreement on behalf of the water users north of the creek as a permanent settlement, had been obtained (Ex. 11-113 "L").

The agreement was signed by chief engineer Code on behalf of the United States and by the water users' committee duly constituted as required by the secretary of the interior on May 9, 1908 (R. 555) and on June 30, 1908, was approved by Frank Pierce,

first assistant secretary of the interior, after having been specifically approved by the office of Indian affairs (Ex. 11-28).

The agreement was duly recorded in the office of the auditor of Yakima County (R. 128).

Notwithstanding the fact that the 1908 agreement was entered into with the knowledge that there was water under said agreement for not more than 2,000 acres of reservation land, the Indian Service continued to construct ditches for the irrigation of additional lands, riparian and nonriparian, so that in 1915 ditches had been constructed making it possible to irrigate 4,968 acres of reservation land, if water had been available (R. 129 [10]). In so doing the Indian Service must have planned to use water from another source, and it is stipulated that it was possible from an engineering and physical standpoint to divert water from the Klickitat River, which rises on the reservation, to the Ahtanum Valley to supplement the flow of the Ahtanum (R. 129 [14]).

On January 15, 1919, the Honorable E. B. Meritt, assistant commissioner of the office of Indian affairs, department of the interior, wrote to Mr. Marvin Chase, state hydraulic engineer, at Olympia, Washington, as follows (Ex. 13-J):

“The office is in receipt of your letter dated January 7, 1919, in further reference to the contract between the United States and numerous water users along Ahtanum Creek, dated May 9, 1908, and approved by the First Assistant Secretary of the Interior June 30 of that year.

“Supervising Engineer L. M. Holt has been directed to carry out his operations on behalf of the Government in accordance with the terms of the aforesaid contract. In view of your earnest protestations with respect to this matter, the Office feels that it is justified in asking that you shall take such steps with respect to the white water users, who are parties to this contract, as may be necessary to require them to carry out their part of this agreement as scrupulously as the Government shall be expected to do.”

Thereafter proper statutory proceedings to adjudicate and limit the rights of the water users in Ahtanum Creek were taken as requested. These culminated in the decision of the supreme court of the State of Washington on April 27, 1926, *In re Ahtanum Creek*, reported in 139 Wash. 84, in which the court said (p. 88):

“Twenty-five per cent of the water of the streams is owned by the United States, and controlled and administered by the Indian Bureau for the use and benefit of Yakima Indian lands under irrigation, leaving seventy-five per cent of the waters to be adjudicated herein.”

It is stipulated that the United States government had knowledge that the State of Washington was adjudicating the waters of Ahtanum Creek in the foregoing proceeding, and that the United States had an opportunity to appear therein but decided against such appearance (R. 128 [7]).

The State of Washington takes the position that this adjudication is final and binding on all parties.

The United States has never given formal notice to the State of Washington that either the agreement of 1908 or the adjudication of 1926 was not binding.

Notwithstanding the commencement of this action, the United States had accepted the benefits of both the agreement of 1908 and the adjudication of 1926 and is still accepting those benefits.

There is therefore no basis in fact for the argument of the United States summarized on pages 20 and 21 of its brief, and particularly for the statement or inference that the agreement of 1908 was entered into by unauthorized subordinate officials of the department of the interior. It was in fact executed with the approval of the secretary of the interior and the cooperation of the attorney general of the United States.

APPELLANT UNITED STATES SEEKS MORE WATER THAN IS CARRIED BY THE RIVER IN LOW-WATER MONTHS

Appellant apparently seeks not only to ignore the agreement of 1908 and the state adjudication under which it is still receiving benefits but, in attempting to secure enough water to irrigate additional lands, asks this court to give it more water out of Ahtanum Creek than will be found in it during the low-water months.

In Paragraph XII of its complaint (R. 8-12) appellant asks for a total of 38.40 cubic feet per

second of time of the waters of Ahtanum Creek and its tributaries during the month of August of each year. This amount is itemized as 37.70 cubic feet per second in the main channel, .39 cubic feet per second at the headgate of canal # 1, .09 cubic feet per second at the headgate of canal # 2, .19 cubic feet per second at the headgate of canal # 3, and .03 cubic feet per second at the headgate of canal # 4.

Appellant's demand is apparently based upon the amount of land it wishes to bring under irrigation regardless of the supply of water. In any event appellant asks for a total of 38.40 cubic feet per second of waters of Ahtanum Creek for the month of August of each year. This would equal 2,304 acre-feet for the month of August.

The amount of water in the river for the month of August for previous years may be ascertained by reference to Appendix B to be found on pages 75-77 of appellant's brief. For the year 1931 Appendix B shows that there was in the north fork of the Ahtanum Creek during the month of August a total of 640 acre-feet and in the south fork of the Ahtanum a total of 219 acre-feet making a total of 859 acre-feet in Ahtanum Creek for the month of August 1931. (Appellant's claim is 2,304 acre-feet for each year.)

Moreover, during the month of August 1931 the maximum number of cubic feet per second for any day was 16, and on certain days of that month there was a minimum of 12 cubic feet per second (appellant prays for 38.40 cubic feet per second).

Similarly, during the month of August 1946, there was a total in both forks of Ahtanum Creek of 1,936 acre-feet with a minimum of 25 cubic feet per second for that month, and for the year 1947 we find that for the month of August there was a total of 1,686 acre-feet (2,304 claimed by appellant), with a minimum of 24 cubic feet per second (38.40 claimed by appellant).

THE ADJUDICATION OF THE WATERS OF AHTANUM CREEK BY THE STATE OF WASHINGTON BINDS APPELLANT

The State of Washington, exercising its jurisdiction to adjudicate property rights of all persons within its boundaries (*Pollard v. Hagan*, 3 How. 212, 44 U. S. 212, 11 L. Ed. 565), adjudicated, limited and fixed the rights of all parties to the waters of Ahtanum Creek in the year 1926 (*In Re Ahtanum Creek*, 139 Wash. 84).

By this decree the United States was recognized to be the owner of 25 per cent of the waters of said creek for the benefit of the owners of land on the reservation south of the creek.

This adjudication was by proceedings in rem under the water code of the State of Washington, RCW 90.04.020 *et seq.*, and were taken with the knowledge of the United States government which had an opportunity to appear therein but decided not to (R. 128). It was in effect taken at appellant's

suggestion (Ex. 13-J "A"), and with the assurance of the Federal government's cooperation as long as the rights of the Indians were not infringed (Ex. 13-a).

The State of Washington issued certificates of water rights to the various claimants whose rights were adjudicated. These certificates are evidence of title. Should plaintiff be allowed to prevail in this case, these titles would be destroyed and the state's system of water titles based upon decrees of the court destroyed.

THE SECRETARY OF THE INTERIOR HAD THE POWER AND AUTHORITY TO ENTER INTO A BINDING AGREEMENT LIMITING THE WATER FOR BOTH RESERVATION AND NONRESERVATION USE

The evidence is overwhelming that the parties acted with the utmost good faith in making the agreement of 1908 limiting rights in the waters of Ahtanum Creek. The secretary of the interior, in making this agreement, did not in any way abrogate or modify the Treaty of 1855. He merely secured for the United States as guardian of the Indians a very favorable determination of the amount of water reserved for their use. It was a determination of the extent or boundary of rights and well within the authority of the secretary of the interior. *Lattimer v. Poteet*, 14 Pet. 4 (U. S. 1840).

Title 5 and 6, U. S. C. A., § 485, delegates to the secretary of the interior ample authority to enter into the 1908 agreement. It reads as follows:

“The Secretary of the Interior is charged with the supervision of public business relating to the following subjects: * * *

“10. The Indians. * * * ”

The secretary of the interior is empowered by this statute to direct and supervise all the public business of the United States relating to the Indians. *Buster v. Wright*, 135 Fed. 947.

Title 25 U. S. C. A. § 2, under duties of the commissioner, provides that the commissioner of Indian affairs shall, under the direction of the secretary of the interior, have the management of all Indian affairs. The limiting agreement of 1908 was approved by both the commissioner of Indian affairs and the secretary of the interior.

Title 25 U. S. C. A. §§ 381 and 382, are cited in the brief of appellee, Ahtanum Irrigation District, with cases which would sustain the authority of the secretary of the interior to enter into the agreement of 1908. These cases will not be repeated. Intervener wishes to point out, however, that the attorney general of the United States in effect approved the settlement made by the secretary of the interior by directing the United States attorney at Spokane to refrain from filing an action in the United States district court while the settlement was being consummated.

THE SECRETARY OF THE INTERIOR NOT
ONLY AFFIRMED THE 1908 AGREEMENT
BUT THEREAFTER DETERMINED IT TO
BE VALID AND BINDING

The secretary of the interior necessarily made an administrative interpretation of the validity of the limiting agreement of 1908 in deciding to enforce the same and inviting the State of Washington to do likewise.

The state in adjudicating the waters of Ahtanum Creek also construed the limiting agreement of 1908 as valid.

Detailed references in the brief of appellee, Ahtanum Irrigation District, showing the administrative construction in the office of the secretary of the interior that the agreement of 1908 was valid will not be repeated in this brief.

Counsel for appellee, Ahtanum Irrigation District, have also pointed out that arrangements made by the government to secure additional water for the Yakima Indians are predicated upon the validity of the 1908 agreement and in effect bar appellant's present attempt to abrogate this agreement.

APPELLANT IS NOW ESTOPPED TO DENY
THE VALIDITY OF THE AGREEMENT
OF 1908

The United States in this proceeding is admittedly acting in a proprietary capacity, rather than as a sovereign, and is subject to all of the rules of estoppel and laches. *U. S. v. Beebe*, 127 U. S. 338.

The State of Washington believes that these principles apply and adopts the argument of Appellee, Ahtanum Irrigation District, particularly calling attention to the case of *U. S. v. West Side Irrigating Company*, 230 Fed. 284.

GRANTING OF ANY RELIEF TO APPELLANT
WOULD BE A DENIAL OF THE SOVEREIGNTY
OF THE STATE OF WASHINGTON

When the State of Washington became one of the sovereign states of the United States of America it authorized the Federal government to appropriate sufficient waters for its needs (p. 728, § 66, Laws of 1889-90). The United States did not appropriate any of the waters of Ahtanum Creek but did acquire the right to 25 per cent thereof by virtue of the agreement of 1908 treated as valid by the sovereign state. It cannot now in this action limit the state's sovereignty nor take from nonreservation water users rights which the highest court of the state has adjudicated belong to them.

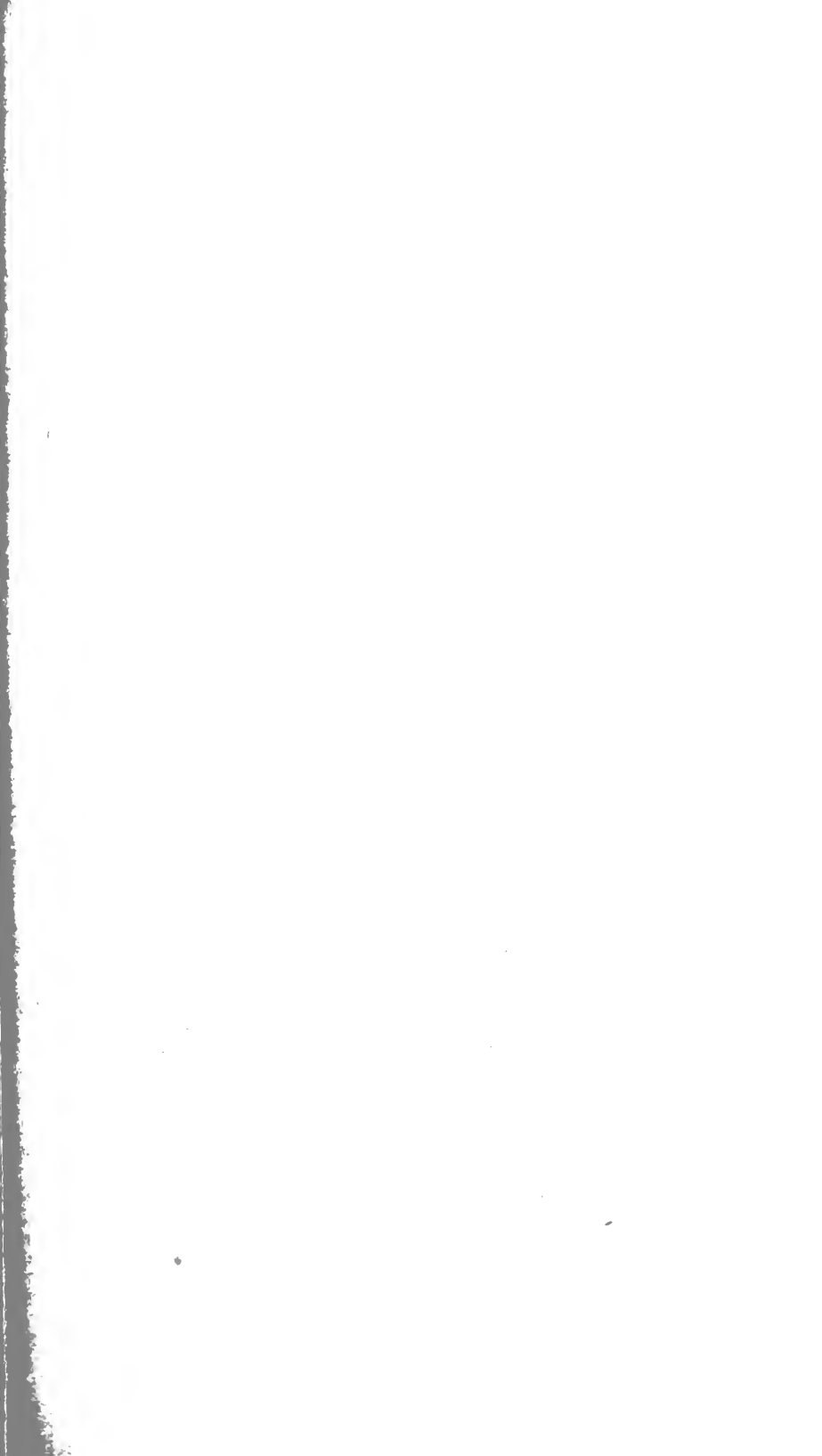
It is respectfully submitted that the judgment of dismissal entered in this case should be sustained.

Respectfully submitted,

DON EASTVOLD,
Attorney General,

E. P. DONNELLY,
Assistant Attorney General,

*Attorneys for Intervening Appellee,
State of Washington.*



APPENDIX "A"

Opinion of the HONORABLE JAMES ALGER FEE
Reported in 124 F. Supp. 818

UNITED STATES

v.

AHTANUM IRRIGATION DISTRICT, et al.

No. 312

U. S. DISTRICT COURT E.D. WASHINGTON S.D.

March 7, 1953. Amended January 18, 1954

Supplemental Opinion January 18, 1954

[The text of the opinion begins on page 823, Volume 124, F. Supp. Succeeding pages are indicated in brackets.]

*[823]

* JAMES ALGER FEE, District Judge.

By the Treaty of 1855, the Yakima Indians ceded to the United States all their rights in a larger expanse now included in the State of Washington and reserved a smaller area for their own use. For them the United States became trustee of this land. The north boundary of the reservation ran along Ahtanum Creek, but did not include the stream.^① The

^① 12 Stat. 951. It is obvious, notwithstanding doctrines of international law relating to treaties of civilized nations and notwithstanding the domestic common law of the states or of England relating to the thread of the stream, which the Indians certainly did not understand, that neither the Indians nor the white negotiators considered the water of any value except for fishing and for the limited domestic and stock uses of that date. The stream was not considered an important asset to the reservation as a whole or to any particular parcel of land at the time. The attempt to read current demand for water into the language of this treaty is to forget the events of a hundred years of history.

bulk of the water there comes from a branch which has its source upon what were then by that cession public lands of the United States. During the ninety-seven years since the treaty, numerous persons, defendants here, have acquired lands north of the reservation by patent from the United States. Both before and after the issuance of patents, these owners and their predecessors made beneficial use of the waters of the Ahtanum upon various of these parcels of land and now possess water rights appurtenant thereto. After 1873, there was considerable water appropriated therefrom by the whites, and some was appropriated for Indian lands. Some few years later, Washington was admitted as a state, 25 Stat. 676, 26 Stat. 1552. After the admission, appropriations continued both north and south of the Ahtanum until more was claimed than flowed therein at low water stage. When governmental agencies finally became impressed with the opportunity of reclamation of western lands, under federal control, this feature led to conflict.

However, in 1908, an agreement was made by government agents and representatives of white owners dividing the water between the reservation and the lands beyond.^② Still later, at the suggestion of the government, the rights of the users upon lands off the reservation were fully adjudicated by the state

^② This agreement, dated May 9, 1908, and signed by W. H. Code, Chief Engineer of Irrigation, Indian Bureau, approved June 30, 1908, by Frank Pierce, First Assistant Secretary of the Interior, and by representatives of the users of water situated north of the boundary, was recorded in the office of the Auditor of Yakima County, Washington, in Vol. 72 of Deeds on page 35.

courts. The Indian lands involved had been allotted in severalty and were held individually by trust patent, and the Indian nation, as such, ceased to have

*[824]

rights therein. A great number of these *allotments have been patented in fee and are now owned by whites. Water is furnished to such lands by a ditch originally constructed to carry the share of the waters of the Ahtanum set aside for the Indians by the agreement above referred to. In 1947, the government brought this proceeding to obtain the entire flow of the Ahtanum for the Indians. The whites who claim waters north of the boundary are made defendants, as well as the successors of the Indian allottees on the reservation. The claim of the government set up by the complaint is that by the treaty there was reserved for the Yakima Indian nation the right to all the water of the stream for use upon lands included in the reservation.

When the United States, by the Act of July 26, 1866, 14 Stat. 251, and subsequent legislation, freed the waters flowing unappropriated over public lands in order to allow ownership to be acquired therein by beneficial use, the Territorial Legislature, differentiating the conditions prevailing then in Yakima County, proclaimed that the custom of appropriation would be the source of the title to water rights in the area thereafter.^③ By executive and congressional action, based upon the consent of the people

^③ Session Laws 1873, p. 520.

in the area, the State of Washington was thereafter admitted to the Union. Following the precedent set by the territorial lawmakers, the State has adopted, by legislation of its people, by acts of its legislature and by decisions of its courts, and has promulgated the law within its boundaries. In judicial proceedings brought regularly in its courts, the State has continuously exercised jurisdiction over waters so appropriated in Yakima County, where the reservation and the other lands lie,^④ with the exception of the water allocated to the Indians by the agreement of 1908.

The State, with the consent of all concerned, has appeared as intervenor in this proceeding to protect its rights and prerogatives as the local sovereign and as *parens patriae* in behalf of the individual patentees north of the boundary, who are its citizens and who claim property rights under its laws and under the decrees of its courts.

This case then, at the outset, presents a highly important problem as to the authority of the federal government over property rights granted by it to individuals within the confines of a state admitted upon equal footing with the thirteen original states. As a preliminary to a determination of these questions, it must be discovered how far the claims of the United States impinge upon the sovereignty of the State of Washington, to which was reserved "the powers not delegated to the United States by the

^④ C. Horowitz, Riparian and appropriation rights to the use of water in Washington, 7 Wash. L. Rev. 197.

Constitution, nor prohibited" by the fundamental law "to the States respectively."^⑤

The division of powers between the central government and the states is fundamental and is firmly established by the Constitution. The authority of the federal government is limited by the words of that document and is by definition either express or implied by necessity from the fundamental text. But in time of war, in the interest of self-preservation, these guaranties may necessarily be eroded in the rush of events. Nevertheless, it is essential to preserve the balance of local and central governments thus established. It is as much the duty of this Court to preserve states' rights as to confirm in the federal government the necessary authority in an existing emergency.

In the expanse of water law, the rights of each state to control its domestic economy have been expressly recognized. The property interests of individuals established under the theory of water rights current by the interpretation of the particular state

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have been *treated as vested rights. At the culmination of a series of cases which pointed the way, the Supreme Court of the United States, in *California-Oregon Power Co. v. Beaver-Portland Cement Company*, 295 U. S. 142, 55 S. Ct. 725, 79 L. Ed. 1356, affirmed a decision made by the writer of this opinion in the federal District Court for Oregon, 9

⑤ Amendment X, Constitution of the United States.

Cir., 73 F. (2d) 555, and gave final confirmation of the doctrine that the individual state, by legislation and decision, has absolute power to lay down its own peculiar rule of property rights in waters within its boundaries. These rights of the state, the United States recognized when the State of Washington was admitted, and no reservation was made of the rights to water or control thereof, notwithstanding thirty years had then passed since the proclamation of the treaty. There is then no residual power of the federal government to reclaim or recapture water rights which it has granted to individuals and which the State has recognized since its admission to the Union. It is conceded in this case that there are no paramount rights of the government in the sense that exercise of uncontrolled sovereign power is involved.

But, more important still, the act of admission was a grant of jurisdiction. The gift of the power to hear and decide, bestowed by the sovereign people of this country through their representatives in Congress and the executive department, must be weighed in the light of precedents set up in the dusk of Anglo-Saxon law. But we need not evoke dim memories of grants of jurisdiction such as soc and sac, infangthief and utfangthief, in order to decide this problem. Questions of jurisdiction mark the boundaries of power between sovereignties. If the courts fail to uphold the reservation of power by the Tenth Amendment—the rights of the states against federal administrative aggression—the essential structure of our balanced authorities will be destroyed.

With the act of admission, there was ceded to the State of Washington jurisdiction to adjudicate the rights of persons as to property within its boundaries.^⑥ The federal courts for this purpose are courts of the state in which they sit. Once a property right in a res has been adjudicated under this grant of jurisdiction, the decree is binding upon all the world, including the government.^⑦

On this primary branch of the controversy, therefore, the Court holds that the State of Washington has had, since its admission, sovereign power to promulgate by legislation and decisions of its courts a rule of waters for property within its boundaries. The United States had no sovereign powers to change or amend such a law of waters. While the United States had power upon its own lands or lands held in trust to make rules which were different from those which had force in the rest of the state, the government had no power to impose such rules upon property outside the reservation. The municipal law of the state was binding not only upon all the other lands and waters of the area outside the reservation, but specifically upon all patented lands and owners thereof within its limits.^⑧

But, if we lay aside these pretensions of continuing sovereignty upon the part of the federal govern-

^⑥ *Pollard v. Hagan*, 3 How. 212, 44 U. S. 212, 11 L. Ed. 565.

^⑦ *Erie Railroad Co. v. Thompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188.

^⑧ The local law will govern the interpretation of patents. *Hardin v. Jordan*, 140 U. S. 371, 11 S. Ct. 808, 35 L. Ed. 428; *Whitaker v. McBride*, 197 U. S. 510, 25 S. Ct. 530, 49 L. Ed. 857. Compare *Sturr v. Beck*, 133 U. S. 541, 10 S. Ct. 350, 33 L. Ed. 761.

ment, there still remain serious questions of the property rights in realty or in water now used outside the limits of the reservation. It should then be considered whether the government, upon its own behalf, has pleaded rights to real property or rights in water and has proven these in strict accordance

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with the substantive law as *promulgated by the state by the evidence adduced at trial.

Even in the field of property rights, the feeling of the paramount sovereignty of the central power makes itself prominent.^⑨ During the last few years, as a result of the drive to acquire paramount rights, there has been apparent the theory of the policy-making agents that the government has the power to re-examine all grants, no matter how ancient or how well recognized by contemporary legislation and construction of nearly a century, as if the central government were still, as it once was, landowner and sovereign of all the rights in the area covered by the western states.

⑨ An attempt to take back vested interests in lands already patented by the United States without adjudication was prevented by the United States Supreme Court in *United States v. Oregon*, 295 U. S. 1, 55 S. Ct. 610, 79 L. Ed. 1267, in the first instance. In subsequent proceedings, the persistent effort to expropriate such interests in realty by executive order was finally defeated by the decisions in *United States v. Otley*, D. C., 34 F. Supp. 182, affirmed *United States v. Otley*, 9 Cir., 127 F. 2d 988.

The attempt to write a new type of land title by condemnation proceedings was frustrated in *United States v. Bauman*, D. C., 56 F. Supp. 109; *United States v. 9.94 Acres of Land*, D. C., 51 F. Supp. 478. See *United States v. 16.747 Acres of Land*, D. C., 50 F. Supp. 389.

Further, the attempt to escape payment for actual property interests taken was prevented in *United States v. Aho*, D. C., 68 F. Supp. 358, and *United States v. Florea*, D. C., 68 F. Supp. 367.

The situation has two cardinal points: first, the adjective or procedural; second, the substantive law. On the procedural side then, it has become the fashion for the policy-making lawyers of the government to direct the filing of complaints against individuals, which do not permit the examination of the rights of the government, but which burden the private defendant with the necessity of disproving every possible aspect of any putative claim that ingenuity may subsequently suggest. It was nothing new in this case, therefore, that a complaint was filed which stated no cause of action and apparently suggested some right over and above the rights which ordinary landowners for whom the government is trustee would have. It is characteristic of the attempt to retake for the benefit of the central power rights which long ago passed into private ownership.

Since the complaint did not define the rights of the individual wards of which the government was acting as trustee, the motion to dismiss might well have been sustained.¹⁰ The loose rules of pleading, however, give full scope for anyone attempting to

¹⁰ Under the state court rules, a complaint in an action to quiet title to a water right or to enjoin a violation thereof should distinctly allege (1) ownership and possession of the right by plaintiff, (2) invasion of and injury to the right by defendant, and (3) call upon defendant to set up any adverse interest defendant may have. *Spring Hill Irrigation Co. v. Lake Irrigation Co.*, 42 Wash. 379, 35 P. 6; *Miller v. Lake Irrigation Co.*, 27 Wash. 447, 67 P. 996; *Simpson v. Harrah*, 54 Or. 448, 103 P. 58, 1007; *Kinney on Irrigation and Water Rights* (1912), § 1547.

In an action to quiet title to a water right, the complaint should show that the plaintiff owns or possesses any subsisting interest in, or right to, the exact quantity of water or the use thereof. See *Inyo Consolidated Water Co. v. Jess*, 161 Cal. 516, 119 P. 934, 935.

prevail by use of the paramount position of the sovereign.^⑪ Therefore, the questions of law were reserved for trial and pre-trial conferences were held. These devices, which are so eminently successful with private litigants, failed completely to obtain definition of the government position from these attorneys, acting on direction from the national capitol. The result is that the fundamental theory of the government lawyers has never been outlined in the pre-trial order or elsewhere. Instead, it was argued

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with tremendous insistence that each individual landowner must affirmatively allege *and prove by a preponderance of the evidence has title to the water right of which he is in possession by long user and also the beneficial use to which he is now placing the water and, more especially, the absence of waste.

Before any discussion of the proof, reference must be made to the pre-trial order drawn by the lawyers but signed by the judge. There were no issues of fact or law to particularize the claims of the government. An attempt to try issues which have not been outlined by either pleadings or pre-trial order is not only futile, but it is unjust. Any issue not so formulated cannot be tried because the parties do not know against what to defend. It is not in the case. The provision of the Civil Rules^⑫ that any issue upon which evidence has been introduced without objection may be decided in the trial

^⑪ See Wiel, *Water Rights in the Western States* (1911), § 636.

^⑫ Rule 15(b), *Federal Rules of Civil Procedure*, 28 U. S. C. A.

court or on appeal is invalid if it include such an issue. Unless the cause of action and defense be somewhere delineated before judgment, to the knowledge of the parties, due process of law has not been accorded and the trial is patently unfair.

This Court refuses to try any such issue.

The Court therefore tries the one issue of whether the government has proven that it is trustee for the Yakima Indian nation of the entire flow of the Ahtanum reserved by the Treaty of 1855 and therefore has the right to an injunction against anyone using any of the flow.¹³

The government had the burden of establishing either that the Indian wards had had possession of the water right and had been ousted recently by the defendants or that these wards had title thereto and, as a result, the right to immediate possession.¹⁴

¹³ The party alleging the existence of a water right has the burden of proof and must prove it unequivocally. *Wiel, Water Rights in the Western States* (1911), § 636; *United States v. Humboldt Love-lock Irrigation Light & Power Co.*, 9 Cir. 97 F. 2d 33, 42.

¹⁴ All the authorities are in accord that, in an action for an injunction against interference with, or to quiet title to, water rights, the burden is on the plaintiff to establish his ownership of the right in question, *Miller v. Lake Irrigation Co.*, 27 Wash. 447, 67 P. 996.

In *Spring Hill Irrigation Co. v. Lake Irrigation Co.*, 42 Wash. 379, 85 P. 6, a complaint alleged ownership in fee simple and possession of the first right to divert water. The Court held, 85 P. at page 7: " * * * it alleged a good title to water rights, and it challenged the defendants to set up any claims they had against such rights."

" * * * where it appears or was admitted that the plaintiff was the holder of the record legal title and entitled to the possession, it then devolved upon the defendants to avoid that title * * * ." *White v. McSorley*, 47 Wash. 18, 91 P. 243, 244.

"If the plaintiff claims a superior right by appropriation, the complaint must set forth, with sufficient clearness and fullness, the fact of appropriation, the purpose for which the appropriation was made, and the amount of water necessary to effect such purpose." *Black's Pomeroy on Water Rights* (1893), § 73, p. 130.

An allegation that plaintiff had a right to all the water in the creek during the dry season has been held too indefinite for specific relief. *Porter v. Pettengill*, 57 Or. 247, 110 P. 393. See also *Long on Irrigation*, 2d Ed., § 269, p. 463.

This principle is firmly settled in land litigation whether at law or in equity.¹⁵ The possession of the flow or usufruct is proven by actual application of a specified quantity of water to a beneficial purpose on a particular piece of land.¹⁶ Water rights, whether riparian or appropriative, constitute real property and are appurtenant to particular pieces of land.¹⁷

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The proof must have shown, in *order to prevail or even require answer other than a general denial, that the United States appeared as trustee of the naked legal title for certain Indian wards, naming them, who owned, respectively, the equitable title to a piece of land, describing it, which land was entitled to a definite quantity of water, in cubic inches under a certain pressure, and such flow had been bene-

¹⁵ Kinney on Irrigation and Water Rights (1912), §§ 1554, 1640; Miller v. Lake Irrigation Co., 27 Wash. 447, 67 P. 996.

¹⁶ "His right as an appropriator depended upon continued use, and, upon abandonment of the use of any part of the water, that part was subject to new appropriation." Smith v. Green, 109 Cal. 228, 41 P. 1022, 1024.

¹⁷ "That water rights for use upon the lands are considered appurtenant to the land, and therefore realty, is declared by our statutes and prior decisions of this court." Madison v. McNeal, 171 Wash. 669, 19 P. 2d 97, 99.

"Water is sometimes held to be real estate, and to pass by grant as the right of a riparian owner to the natural flow of a stream across his lands, a right so inseparably annexed to the soil as to pass with it, not as an easement or appurtenance, but as part and parcel of the land itself." Methow Cattle Co. v. Williams, 64 Wash. 457, 117 P. 239, 241.

ficially used thereon until deprived thereof by act of defendants.¹⁸

Since this was not a quo warranto proceeding, such as the Crown was wont to bring in England to question franchises and jurisdictional and property rights to the harassment of its subjects, the Court refused to require the defendants affirmatively to assume this burden. Again, in the face of the persistent refusal of the government to define claims against defendants, the Court refused to require these individuals to state an affirmative defense. This procedural claim of the government lawyers was encysted in the pre-trial order. Therefore, the exact claim of neither side is developed.

Although the pre-trial order was thus unsatisfactory, the Court signed and entered it and put the case on trial.

The government did not prove possession of the flow as appurtenant to any piece of real property of a single drop of the water of which it claims the

¹⁸ Plaintiff's right should be stated in inches or gallons. *Lakeside Ditch Co. v. Crane*, 80 Cal. 181, 22 P. 76.

In *Simpson v. Harrah*, 54 Or. 448, 103 P. 58, at page 59, a suit to enjoin defendant from interfering with the flow of water into plaintiff's irrigation ditch, where plaintiff has claimed no definite quantity of water and the evidence does not disclose the amount to which plaintiff is entitled, the Court held: "Neither the pleadings nor the proof are sufficient to enable us to determine the water rights between plaintiffs and defendant as to the quantity of water either one needs or is entitled to, or as to their relative proportions of the water in the ditch."

In *Longmire v. Smith*, 26 Wash. 439, 67 P. 246, 58 L. R. A. 308, a suit to enjoin subsequent appropriators from interfering with waters appropriated from him, a plaintiff will not be deprived of his remedy because in the trial court he did not describe a definite measurement of what water he used, and because there was satisfactory proof of the amount required by his lands; but the case will be remanded to the trial court to ascertain the amount of water necessary for plaintiff's lands.

Indian nation is deprived by the patentees of the United States north of the boundary. In fact, there was no proof that the Yakima Indian nation had any rights in this water or interests therein. No communal lands of the Yakima nation are shown to be susceptible to irrigation by any waters of the Ahtanum or to have ever been irrigated thereby.¹⁹ The proof does show that there are various parcels of land, held at some time by allottees, within the confines of the Yakima Indian reservation upon which approximately one-fourth of the flow of the Ahtanum has been beneficially applied since about the year 1900. But there is no complaint as to any interference by anyone with the beneficial enjoyment of this portion of the flow allocated by the agreement above mentioned which has actually been used south of the Ahtanum.

The proof does not show that most of the parcels now in trust for individual Indians are riparian to the stream. On the other hand, most of them are shown not to have any connection with any appropriation or use of water which was made before the state came into the Union. Likewise, the government did not prove that a single cubic foot of water

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*now being used on the north side of the Ahtanum was ever used upon the reservation from 1855 to the present time. This is conclusive that there is no right

¹⁹ One of the maps indicates a minor parcel of tribal land may be susceptible of irrigation, but this is immaterial since it is not shown that water was used thereon before the agreement for division.

to have defendants set up specifications of their rights. The lands on the reservation are now receiving exactly the water which they have received and used since 1908.

There is no proof then of actual possession of this water by anyone south of the stream. If title were established by proof, then the right of possession would follow. The proof of title or the better right to the ownership was attempted to be adduced by the government. But here again, the indistinct allegations of the pleading distort the claims and make these unintelligible.

Only two-thirds of the lands susceptible of irrigation on the reservation are owned by Indian allottees, which the United States is empowered to represent as trustee. The balance have been patented in fee and, as to all property rights both of water and of land, have passed into the jurisdiction of the State of Washington. Usually these parcels were purchased from the original Indian allottee by a white man.

The government joined these owners of former reservation lands as nominal defendants, although they use water allocated to the Indians by the agreement of 1908. But its attorneys have never defined what relief they claimed against these parties. The reason for this is that such a claim is impossible of definition. The United States patented each of these parcels to an Indian in fee, and this title carried with it as an appurtenance the usufruct of that amount of

water which was at that time beneficially used upon that particular piece of real property or the amount to which the land had title by reservation or riparian location and no more. The land and the water right so limited are held by the present owners under the municipal law of the State of Washington. There is no process whereby the United States can take such water from the present owners except upon payment of just compensation. The government cannot impeach its own conveyance.

These present owners of land and water rights so patented to Indians and released from government ownership were only joined as defendants so that they could make common cause with the government against use of water on non-reservation lands. This they did by what amounts to intervention. The government in the ultimate is placed in the anomalous position of attempting to establish the title to the water for its present owners against other of its citizens who patented lands and used water thereon more than fifty years prior to the conveyance of these reservation lands.

The question of whether the government has proved title to the entire flow of the Ahtanum will now be considered. At the time of the ratification of the treaty, the United States owned all the land and the water and had complete sovereignty over the area when the Indian rights were extinguished. It was not necessary for it to make any appropriation of water for itself or the Indians. All it had to do

was to take the water and use it. All authorities agree upon these propositions. However, when other rights in the area were created in private individuals and in the state by the United States and were guaranteed by it, other problems arose.

“The power of the Government to reserve the waters * * * is not denied, and could not be”^{②①} when it owned both land and water and was sovereign in the area. Such a reservation would be a part of the title to each piece of land and would bind all successors to any lands on the watershed. But whether there was a reservation is not a question of law but of fact.^{②②}

If the need were not obvious and in accordance with dictates of necessity, no reservation would be
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implied. The limit *of the implied reservation would generally be the amount of water actually appropriated within a reasonable time. In many cases, the necessary amount has been found exceedingly small. In a leading case,^{②③} the water of Milk River, with all its tributaries, had flowed through a larger reservation created by an early treaty. In 1888, 25 Stat. 113, by a new treaty, the reservation was diminished and one boundary placed in the center of Milk River for the purpose of allotment in severalty with the avowed intent to train these Indians

^{②①} *Winters v. United States*, 207 U. S. 564, 577, 28 S. Ct. 207, 212, 52 L. Ed. 340.

^{②②} *United States v. Walker River Irrigation District*, 9 Cir., 104 F. 2d 334.

^{②③} *Winters v. United States*, *supra*.

to agricultural pursuits. The reservation lands were completely arid. By that time, the absolute necessity of using all available water for the reclamation of desert lands was clearly recognized by everyone. It was held that there was a reservation of waters for use on these lands and that these property rights were not destroyed by the admission of Montana to the Union less than a year later. The government, however, moved slowly, but in 1898 was constructing a canal to carry out an appropriation of five thousand cubic feet. An injunction suit was brought by it to restrain persons who were interfering with the flow of this amount of water because they had anticipated the government by making appropriations above the reservation about a year before the canal was commenced. Since the government's application of water to a beneficial purpose was within a reasonable time, it was correctly held that the reservation created a property right superior to those who attempted to claim the water by acts.

In the Walker case,²³ the government sued to prevent interference with the flow of one hundred fifty cubic feet, which was a substantial portion of the flow of a river. It appeared that the reservation had been created by executive order in 1859. Since the country was completely arid, there was immediate use of water to considerable extent by the Indians. In 1887 they were using approximately the same quantity of water as at the time the lawsuit was

²³ United States v. Walker River Irrigation District, 9 Cir., 104 F. 2d 334.

commenced. Upon this basis, the Court awarded them 26.25 cubic feet of water. None of these cases indicates that a reservation of an entire stream could be made for the Indians and then the lost rights recaptured from the whites, who had meantime built an empire by the use of this water upon lands patented to them by the United States for that purpose.

In a most persuasive case, *Byers v. Wa-Wa-Ne*,²⁴ the Supreme Court of Oregon construed the Treaty of 1855 with the Umatilla, Cayuses and Walla Walla, which is in almost identical terms with the one with the Yakimas. There the Umatilla River ran through the reservation, which also consisted of semiarid lands. The trial court held, following the *Winters* case, that there was a water right reserved to each allotment of the reservation, and the Indian passed this to his white successors in a modified form. The Supreme Court reversed. It was held that the treaty had not reserved any rights expressly or by implication, but that by the situation, the parcels abutting on the stream had a right to water for stock, domestic purposes and the irrigation of gardens.²⁵ The Court upheld an administrative grant

²⁴ 86 Or. 617, 169 P. 121.

²⁵ In a recent case, *Seufert Bros. Co. v. Hoptowit*, 193 Or. 317, 237 P. 2d 949, at page 953, the Supreme Court of the State of Oregon reaffirmed this view and held: "The implied rights are based directly upon and grow out of the express right reserved. No right may be implied that does not have as its basis some express provision in the treaty itself. The rule is well stated in *Byers v. Wa-Wa-Ne*, 86 Or. 617, 634, 169 P. 121, 126, as follows: 'Under any rule of construction, if it is proposed to base on the treaty such a right as that contended for by the government, there must be found in the treaty something from which the right can be implied. The treaty may be read in the light of the circumstances under which it was negotiated and ratified. Consideration may be given to the purposes in view and to the situation of the parties, but unless the implication of these water rights is found in the treaty when read in the light of these purposes and circumstances, the rights contended for must be held to be nonexistent.'"

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of water rights to outside persons, *which was later confirmed by legislation. This opinion is binding upon the government because the United States attorney represented the Indian wards, and, although the treaty was construed, there was no request for certiorari.^{②⑥}

Here, in accordance with previous decisions, we decide that there was a reservation of the use of some waters of the Ahtanum. But the reservation was extremely tenuous and narrow. The Court determines from the facts in evidence that there was reserved for such parcels as bordered on the stream the right to have sufficient water flow as would suffice for watering of livestock, domestic uses and the irrigation of gardens, where this was necessary on these bordering lands. A similar right was intended for the lands on the north bank riparian to the stream as well as those which comprised both banks of the main or north branch of the Ahtanum, through which flows the major portion of the water eventually found in Ahtanum Creek. The circumstances surrounding the signing of the treaty compel this construction.

^{②⑥} In quite a similar situation, the Supreme Court, speaking through Mr. Justice Van Devanter, has said: “* * * as it appears that for many years the United States has employed and paid a special attorney to represent the Pueblo Indians and look after their interests, our answer is made with the qualification that, if the decree was rendered in a suit begun and prosecuted by the special attorney so employed and paid, we think the United States is as effectually concluded as if it were a party to the suit.” *United States v. Candelaria*, 271 U. S. 432, 444, 46 S. Ct. 561, 564, 70 L. Ed. 1023. Though in a dictum this view has been reiterated recently. “If the United States in fact employs counsel to represent its interests in a litigation or otherwise actively aids in its conduct, it is properly enough deemed to be a party and not a stranger to the litigation and bound by its results.” *Drummond v. United States*, 324 U. S. 316, 318, 65 S. Ct. 659, 660, 89 L. Ed. 969.

The text of the treaty itself had no indication of the reservation of the waters or rights to use water. There is no word or expression therein from which any such intention can be deduced. Other rights, such as the right of fishing, which was deemed important are expressly reserved in relation to streams. The body of the Ahtanum does not run through the area carved out by the treaty. In fact, the principal water bearing branch arises and flows for a long distance through property deliberately excluded by the treaty makers and which is at present in white ownership. The boundary of the reservation established by the treaty runs to the south bank of Ahtanum Creek and does not even include the stream.²⁷ If it had been conceived that water in the amounts claimed today would be needed, it would have been a matter of one stroke of the pen to include the Ahtanum. There was plenty of water upon the Yakima reservation for the needs of the Indians at that date.²⁸ Owing to subirrigation, which generally sufficed for the simple needs of the time, it was long before the desirability of the use of copious irrigation was realized.

²⁷ The Supreme Court in the Winters case, *supra*, recites the inclusion of part of the stream as a fact cardinal to the decision.

²⁸ In fact, there is plenty of water now for the vastly expanded needs of the area. But to get this water into the Ahtanum area requires the expenditure of so much money that Congress has so far refused to make the appropriation. But, even if the legislative body is not inclined to make such an appropriation in justice to the Yakima Indians, it is no ground for robbing the white pioneers by rationalization from modern conditions to read property reservations into a Treaty of 1855.

The doctrine of beneficial use of water developed in the mining districts of California but a few years before even against the landowner, which was usu-

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ally the federal government. The irrigation *of arid lands had not been tried. It was not until 1855 that the doctrine was given an agricultural application even in California. It was not until after 1900 that great pressure developed in regard to the use of water in this area of eastern Washington.

In 1855, the Indians were thought of as a nomadic people, who lived by hunting and fishing and whose chief property consisted in their herds of horses. The whites believed the Indians would be able to support themselves and their animals by the bounteous natural pasture on this soil with its mountains and uplands. While it was the policy of the government to confine them to one area so that they would not bother the whites, there was no policy of allotment, and only the chiefs had individual grounds given them. There was no suspicion as to how water would be used in the vast agricultural development of arid lands as modernly practiced. The government negotiators were conditioned by the idea of riparian rights and had no concept of the use of water on elevated hill slopes miles away or even watersheds away from the banks through which it naturally flowed.²⁹ As above noted, except in the California

²⁹ It was subsequently said by the Joint Congressional Commission of 1913: "At the time of this treaty, irrigation was little known, and it does not appear that the subject of water rights bore any important relation to the treaty. It is certain that the value of water rights was not foreseen either by the Indians or the government." 63rd Congress, 2nd Session, Senate Document No. 337, p. 23.

mining camps for about six years previously, no one had conceived of transporting water for long distances and using it upon other lands not riparian to the stream.

The contemporaneous and practical construction carries out the idea that neither the white treaty makers nor the Indians intended any further reservations than those enumerated above. But, if it be conceived that there was a reservation of the entire flow, the United States subsequently granted these water rights to those who took by appropriation. The government had plenary power, notwithstanding a grant to the Indians under treaty or a reservation, to convey any property so granted or reserved to others. *Lone Wolf v. Hitchcock*, 187 U. S. 553, 23 S. Ct. 216, 47 L. Ed. 299. The history of the subsequent legislation, administrative acts and judicial construction can be reconciled with no other theories except these two: either there was no broad original reservation or the government granted water rights to all appropriators without regard to the reservation.

By a series of enactments, the United States permitted persons to acquire property in water as against the United States in accordance with local

customs and decisions. Early among these statutes was the Act of July 26, 1866.^{③①}

Theories as to riparian rights were extremely tenacious in the area which became the State of Washington. A long series of decisions of the territorial and state courts make this abundantly clear.^{③②} It was only after the cruelest necessity forced the change by legislation that the courts began an attenuation of the absolute rights of a riparian owner^{③③}

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for the benefit of all *the people by attaching an obligation of beneficial use before a property right

^{③①} The Act of July 26, 1866, did not create the right to use by prior appropriation of the streams on public land for mining and irrigating purposes, but simply recognized such right which had grown up through the acquiescence of the government and the universal custom of the locality. Where the government allowed the streams on public lands to be diverted for mining and irrigating, and conveyed the land while the streams were so used, the grantee took subject to the changed condition and the rights growing therefrom. *Isaacs v. Barber*, 10 Wash. 124, 38 P. 871, 30 L. R. A. 665; *Geddis v. Parrish*, 1 Wash. 587, 21 P. 314; *Ellis v. Pomeroy Improvement Co.*, 1 Wash. 572, 21 P. 27; *Tenem Ditch Co. v. Thorpe*, 1 Wash. 566, 20 P. 588.

^{③②} See *Benton v. Johncox*, 17 Wash. 277, 49 P. 495, 39 L. R. A. 107; *Brown v. Chase*, 125 Wash. 542, 217 P. 23.

^{③③} In Washington, it is held that judicial notice will be taken of the fact that at least that portion of the state east of the Cascade Mountains was included in the territory where the customary law of miners was in force and the right of appropriating water for agricultural and manufacturing purposes existed although the common law rule of riparian ownership was a part of the law of the state. *Isaacs v. Barber*, 10 Wash. 124, 38 P. 871, 30 L. R. A. 665; *Wiel, Water Rights in the Western States* (1911), § 635. See Misc. Publication 418, U. S. Department of Agriculture, 1942, pp. 62-64, 106-107.

in water could be claimed.³³ This preconceived notion as to water held back the development of the country for many years. However, it is a startling fact that the Legislature of Washington Territory, in 1873, made a special exception of Yakima County, and, following the policy of the Congressional Act of 1866, declared the water of that area open to appropriation.³⁴ This was the natural result of the passage of the Act in 1866 and the application of the same to local conditions in Yakima County. More astounding still is the fact that, immediately upon the passage of this Act, there were appropriations of the waters of the Ahtanum by the whites on the north side and by the Indians on the south. We need not debate as to whether the title of this water was obtained by reservation in the Treaty of 1855, since these were made within a reasonable time thereafter or were valid by the force of the territorial statute. No one questions the right to use this water so appropriated,

³³ The modern tendency is to limit the riparians to actual use. *Kinney on Irrigation and Water Rights* (1912), § 1975.

In *Nesalhouse v. Walker*, 45 Wash. 621, 88 P. 1032, at page 1033, the Court said: " * * * riparian owners are entitled to have their natural wants supplied by using so much of the water as is necessary for strictly domestic purposes, and to furnish drink for man and beast, before any can be used for purposes of irrigation; and after their natural wants are supplied, each party is entitled to a reasonable use of the remaining water for irrigation * * * "

See also *Brown v. Chase*, 125 Wash. 542, 217 P. 23; *Proctor v. Sim*, 134 Wash. 606, 236 P. 114; *State v. American Fruit Growers, Inc.*, 135 Wash. 156, 237 P. 498; *Hunter Land Co. v. Laugenour*, 140 Wash. 558, 250 P. 41.

³⁴ Session Laws of 1873, p. 520. See *Dickey v. Maddux*, 48 Wash. 411, 93 P. 1090.

even today, if beneficial use is made on the parcel to which the flow became appurtenant.³⁵

Although most of the running water of Yakima County touched somewhere on the reservation, the federal government, which had still plenary power, did not repudiate the Act of the territorial legislature. No executive or administrative action was taken to prevent the appropriation of waters either by whites or Indians on or off the reserved lands. In 1877, the Congress passed the Desert Land Act, 43 U.S.C.A. § 321 et seq., which approved all appropriations made in the past and gave specific permission for appropriation of waters on such lands in the future. This enactment, passed only four years later, confirmed the statute of the territorial legislature as to Yakima County and the waters therein.

The later legislative and executive action either adds weight to the finding that in fact there was no further reservation or is proof that the water rights were conveyed away by the government or were abandoned. Let consideration of abandonment take first place. It is an inherent and essential part of the local rule of water rights that the property right fully established will be lost if there be no beneficial use of the water itself within a reasonable time thereafter. Ninety-seven years is not a reasonable

³⁵ To settle once for all that use is the nub and not compliance with mere formality, the Court, in *Kendall v. Joyce*, 48 Wash. 489, 93 P. 1091, at page 1092, held: “* * * a valid appropriation may be made by an actual diversion and use of the water without posting any notice. The one who fails to comply with the statute requiring notice, but actually diverts and uses the water, acquires a good title * * *.”

time. The thirty years between the treaty and the admission of the state was not a reasonable time to

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*make beneficial application.³⁶ Even if the water has once been beneficially applied, the water right is lost if there is not continuous beneficial use through the years.³⁷ This is not theory, but one of the hard necessities of the country. Neither the Indian nor the government negotiators then could have intended to make such wholesale use of the water as is now claimed almost a century later.

The Acts of 1866, 1870 and 1877, which were all later than the treaty, evinced an intention to convey to those settlers on the public domain the right to appropriate waters of the Ahtanum which flowed through public lands and the south bank of which alone was on the reservation.³⁸ These acts were so

³⁶ Where a stream divided into three branches, plaintiffs owned land on the two eastern channels and defendants on the western and in 1865 a dam was built diverting all the water into the two eastern channels and in 1895 plaintiffs attempted to change the flow of the water, the Court held: "* * * the acquiescence by plaintiffs and their grantors and all riparian owners below the point of divergence for a period of 30 years has now lost them the right to change the flow from the new into the old channel." *Matheson v. Ward*, 24 Wash. 407, 64 P. 520, 521.

³⁷ "* * * whatever rights David Lowery had to the land or the water * * * depended upon possession, and ceased with the relinquishment of possession without intent to resume. His right as an appropriator depended upon continued use, and, upon abandonment of the use of any part of the water, that part was subject to new appropriation." *Smith v. Green*, 109 Cal. 228, 41 P. 1022, 1024.

³⁸ In an analogous case involving school lands reserved by the United States government, the Court held that the Acts of July 26, 1866, 14 Stat. 251, 253, and July 9, 1870, 16 Stat. 217, 218, "are general in their application and apply to all government lands. * * * it was intended that rights in waters riparian to such reserved lands could be acquired by appropriation in the same manner that such rights were acquired in waters riparian to the public lands generally." *State ex rel. Olding v. Stampfly*, 69 Wash. 368, 125 P. 148, 150.

construed, and the white settlers made appropriations which became appurtenant to their lands. Acting upon the same construction, many Indians, the record shows, likewise made appropriations. The United States patented the lands to the settlers, and likewise by these acts granted the waters. The administrative construction, based upon the failure to object, shows that no one believed the treaty could be so construed, but that the rights to the water must be obtained under the terms of the acts.

These titles were confirmed by the act of admission of the state thirty years after the treaty without express reservation of these water rights and without limitation of the jurisdiction given to the state tribunals.³⁹ If the United States owned land comprising a complete watershed, it could thereafter still use the water upon any of its lands. But, if there were patentees beneficially using water from the stream, the government was bound in good faith to recognize its own grants both of land and water.

Soon after admission, the State of Washington, by statute, granted to the United States the right to appropriate water for the use of any lands to which the federal government held title.⁴⁰ If the latter or its agents had conceived possible the vast develop-

³⁹ "The United States relinquished all of its rights to the non-navigable waters of the Yakima river to the territory, and later the state, of Washington. The latter had the right to provide and did provide for the use of those waters and fixed the terms upon which the same might be used." *Lawrence v. Southard*, 192 Wash. 287, 73 P. 2d 722, 728, 115 A. L. R. 1308. See *Barker v. Sunnyside Valley Irrigation District*, 37 Wash. 2d 115, 221 P. 2d 827.

⁴⁰ Washington Session Laws of 1889-90, § 66, pp. 706, 728.

ment which has followed in the wake of the application, the whole stream of the Ahtanum could have been taken. In accordance with this same theory,

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Congress, in *1902, required that the government should acquire water only in accordance with the laws of the states.^④

But the administrative construction, upon which great weight is laid in modern times, is actually conclusive. The Indians did not insist upon such rights. Agent after agent held sway in the reservation and did not question the rights of the settlers. The Indians were in tutelage and the government agents did not possess the vision to appropriate the unused portions of the stream until the adventurers had proved what could be done with it. The awakening came about fifty years after the treaty, when the need for water on both sides of the stream became desperate. Thereupon, the Secretary of the Interior made a personal visit to the scene and entered into an agreement giving one-fourth to the Indians and three-fourths to the whites. But it is said the Secretary had no power to grant away property rights of the United States. We are of opinion that he did nothing but recognize the limitations set by practice

^④ Act of June 17, 1902, 32 Stat. 388, 390, 43 U. S. C. A. § 391 et seq. Reclamation Act not only recognizes the law of the particular state, but requires Secretary to proceed in conformity, *Burley v. United States*, 9 Cir., 179 F. 1, 33 L. R. A., N. S., 807. "Certainly, the proviso in the Reclamation Act, 32 Stat. 388, that the Secretary of the Interior shall proceed in conformity with the water laws of the state argues an intention upon the part of Congress to act as did the individual proprietor, and Congress was undoubtedly well advised legally as to its lack of power to do otherwise." *Byers v. Wa-Wa-Ne*, 86 Or. 617, 169 P. 121, 417 Oregon Briefs 269, 351.

upon the usage of water on the reservation and confirm the grants to the owners outside. Recognition was thereby given also to the fact that the government and the Indians were permitted by the territorial legislation to appropriate water in Yakima County and that the permission was renewed by the state enactment referred to. The government thereafter built a canal for the purpose of carrying and applying that portion of the flow so allotted to the Indians. In accordance with the terms of the agreement, masters to divide the water have been appointed year after year by the United States and the landowners north of the stream. Subsequently, the Secretary of the Interior, until the last few years, consistently has recognized these rights,⁴² and Secretary Wilbur, as recently as 1930, indicated that he would stand fast by that agreement. With regard to the waters of the Yakima River, which likewise touch the reservation, the United States proceeded to appropriate them under the law of the state in 1905,

⁴² "They [these suits] are brought to enjoin the Secretary of the Interior from enforcing an order, the wrongful effect of which will be to deprive respondents of vested property rights not only acquired under Congressional acts, state laws and government contracts, but settled and determined by his predecessors in office." *Ickes v. Fox*, 300 U. S. 82, 96-97, 57 S. Ct. 412, 417, 81 L. Ed. 525.

according to the policy crystalized in the Reclamation Act.^{④③}

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*The government agents encouraged the state in 1926 to proceed with the adjudication of the rights to three-fourths of the waters of the stream so long as there was no attempt to question the Indians' right to one-fourth or attempt to adjudicate the remainder. The United States was thus aware of the proceeding. The government was a party to the litigation in the sense that any rights claimed to that

④③ Act of June 17, 1902, 32 Stat. 388. It is to be noted that, in dealing with the waters of the Yakima, which stand precisely in the same position as the waters of the Ahtanum, the proper officers of the Department of the Interior have made agreements for the use thereof and no question as to their validity or the right of the representatives of the Indian Service to do so has ever been raised.

On February 19, 1903, the then Superintendent of the Yakima Reservation made a water-right filing for 1,000 cubic feet per second of water from the Yakima river. Non-reservation water users, who had already appropriated almost the entire low-water flow of the river adversely to the reservation, commenced action in the courts of the State of Washington to enjoin the violation of their rights. At this point, the then Secretary of the Interior, E. A. Hitchcock, undertook to compromise all disputed claims to water rights to the Yakima river and allowed 147 cubic feet per second to the reservation as its low flow water right and an aggregate of 650 cubic feet per second to adverse claimants. This amount proved insufficient for the reservation, and, pursuant to the recommendations of the Joint Commission of 1913, Congress, in 1914, provided for a supply of water for about 70,000 acres of land to be supplied from storage reservoirs constructed by the Bureau of Reclamation at no cost to the Indian. The Indian Service subsequently desired to secure a supply of water for the remaining 50,000 acres of irrigable land and entered into an agreement therefor known as the Joint Letter of March 31, 1921, approved by the Secretary of the Interior, with the Bureau of Reclamation. In 1936, the Indian Service desired to secure additional water, and again with the Bureau of Reclamation entered into a new agreement termed the Joint Letter of September 3, 1936, approved by the Secretary of the Interior, which also modified the 1921 agreement. Subsequent to the 1936 agreement, controversies arose between the Bureau and the Indian Service as to the proper interpretation of the 1936 agreement and the 1936 amendment to the 1921 agreement. As a result, there was issued a Joint Letter of Instructions dated June 21, 1938, signed by the Commissioner of Reclamation and the Commissioner of Indian Affairs and addressed to the Superintendent of the Yakima Reclamation Project and to the Project Engineer of the Wapato (Yakima) Indian Irrigation Project.

portion of the flow must have been asserted by land-owners in that proceeding or they would be lost by judgment. The proceeding was one in rem. All parties had the right to assert their claims in the litigation. The state court had the right to adjudicate rights in rem. If the Indian wards or the government had any rights, these could have been asserted. If it had been desired, the proceeding could have been removed to a federal court or the government could have submitted any rights which the wards had to the state tribunal. The reason the government desired to stay clear of this proceeding was that it attempted an all-out defense of its position in relation to the same series of treaties in Oregon and was there defeated.^④ The proceeding of Washington was open and notorious and bound all the world. Rem. Rev. Stat. §§ 7351, 7373; the dissatisfied claimants took an appeal to the Supreme Court of the State of Washington. *In re Ahtanum Creek*, 139 Wash. 84, 245 P. 758.

The patentees from the United States then in the reservation did not assert any right to the waters of the Ahtanum beyond the amount which they were then using, and were therefore bound by the decree in that proceeding.^⑤ Besides, any of them who have

^④ *Byers v. Wa-Wa-Ne*, 86 Or. 617, 169 P. 121, 417 Oregon Briefs 269-501. It is also to be noted that the United States, intervening in a suit in a state court to determine water rights, is bound by the decree. *Pioneer Irrigation District v. American Ditch Association*, 50 Idaho 732, 1 P. 2d 196.

^⑤ "The volume of the priority awarded a ditch in adjudication proceedings in *res adjudicata*, and the facts upon which such award is based, cannot be inquired into in a collateral proceeding." *Rogers v. Nevada Canal Co.*, 60 Colo. 59, 151 P. 923, 928.

permitted the patentees to use the waters of the stream on lands north of the boundary for a period of ten years have lost any right to object under the law of the state.⁴⁶

The government agents have no more power or authority to question this decree in rem than if they had stood by when property to which the government had a claim was awarded by the state courts in interpleader.

In summary, certain conclusions are thus established. Where the United States has relinquished to a state all its rights to non-navigable waters, as was done by the acts above noted and the admission of the state to the Union, the state has the sovereign power to establish the terms upon which such waters may be appropriated. The state recognized the right

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of appropriation in the *arid lands in the eastern portion of the state and set up an elaborate system of administrative finding and judicial determination.⁴⁷ The right to waters of the Ahtanum beneficially used upon patented lands outside the reservation were under the jurisdiction of the state courts and have been fully and conclusively adjudicated under this statutory plan. The proceeding was quasi in rem and related to specific real property. It was local in character. All the world was warned to set up claim to water rights on the stream. By fail-

⁴⁶ Rem. Rev. Stat., § 156.

⁴⁷ Rem. Rev. Stat., §7351ff.

ing to set up a claim, the United States and each of the Indian wards is foreclosed now of any right thereto. In this regard, there is no paramount right of the United States.

The result is that the government has neither proved that it or any of the Indians has been ousted from the possession and use of the flow, nor has it so far proved by a preponderance of evidence that the Indian nation or the individual Indians had title and right of possession to any part of the water now being used by the whites. Although these conclusions are based upon the failure of its lawyers to put the foundations of title of the government in issue and thereby place the defendants upon notice as to the claims against which they would be required to defend, the result, even if final, would not shock the conscience.

For, even if some Indians have been stirred up, not entirely disingenuously, to claim this as another wrong perpetrated by the whites, the rights of the Indians are not really involved. Were the government to confess its agents had robbed the Yakimas^⑮ by failure to appropriate water for this land, there

^⑮ The unbounded confidence expressed by the Supreme Court in negotiators for the government has had to be modified. See Justice Douglas dissenting in *Northwestern Bands of Shoshone Indians v. United States*, 324 U. S. 335, at pages 358, 361-362, 65 S. Ct. 690, 89 L. Ed. 985. The validity of claims for compensation under appropriate circumstances has been fully recognized. *United States v. Alcea Band of Tillamooks*, 329 U. S. 40, 67 S. Ct. 167, 91 L. Ed. 29.

But no compensation should be given the Indians at the expense of the whites who have purchased land titles from the government and have vested right. Another attempt to do this in which no Indians were involved is found in *United States v. Otley*, 9 Cir., 127 F. 2d 988.

is today on the reservation sufficient unused waters to irrigate all the cultivatable land on the Ahtanum. It is true it cannot be shown that the application of this water is economically feasible because of the very high cost of application. But, if an ethical principle of fairness to a conquered and dependent people is involved, money considerations should not be weighed. There should be some morality in the dealings of the government agents. Even if the Indians are justly aggrieved, the government should not pursue a system of Indian-giving with the white owners off the reservation. It is not just to encourage them to spend more than a generation building communities on the basis of this water, and then arbitrarily confiscate it on the basis of a claimed reservation never expressed in words for almost a century.⁴⁹

However, if it be determined that there are property rights of various individual Yakima Indians which have been violated by the use of water on lands off the reservation, then the government must put itself in a position where those claims can be defined, defended against and determined with clarity.

In order to have any relief, the government must state as to what lands the United States seeks to

⁴⁹ C. Horowitz, *Riparian & Appropriation Rights to the Use of Water in Washington*, 7 Wash. L. Rev. 197, 200.

In *Broder v. Natoma Water & Mining Co.*, 101 U. S. 274, 25 L. Ed. 790, it was held that the rights of water appropriators on public domain, which the government by its conduct had recognized and encouraged, would be protected even without congressional legislation. In *Isaacs v. Barber*, 10 Wash. 124, 38 P. 871, 30 L. R. A. 665, it was held that the Act of July 26, 1866, protected appropriations of water made prior to the Act.

establish the *use of the entire flow of the Ahtanum as appurtenant. It has never been outlined anywhere as to whether the government intends to parcel out part of the flow to patentees on the reservation, and, if so, in what quantities and to what specific parcels. The attorneys for the government have never stated whether they recognized a distinction between use of part of this water by an Indian upon reservation lands as of a different quality from use by a white man on such lands before or after patent. If the whole flow of the Ahtanum is claimed for the Indians, it is a question as to whether the government recognizes a right in a white successor to an Indian holder of a trust patent who later has been permitted to patent and sell his allotment.

There are some of these individual allotments held by trust patent which border upon the stream. It is a question whether the government claims such parcels have greater, less or equal rights with parcels far up on steep hillsides.^{⑤①} There were some of these parcels upon which appropriations of water were actually and beneficially applied at an early date.^{⑤②} There has been no statement as to whether it is

^{⑤①} "The mere fact that a tract of land touches a stream at one point does not make such land riparian at other points on the stream, or to the whole of the stream. The riparian right of such land, or the owners thereof, is confined to the points where the land abuts upon the stream." *Miller v. Baker*, 68 Wash. 19, 122 P. 604, 605.

^{⑤②} If there be any claim that there was actually more water appropriated for individual Indians before the Code agreement than the Indians are now receiving, there may be a basis for adjudication. Likewise, it might be possible for certain several tracts held in trust for individual Indians to claim that such tracts are riparian to the stream and as such to claim such rights. Neither the pleading nor the pre-trial order make any such position clear.

contended such parcels have prior rights or only equal rights with parcels which were never irrigated until thirty years thereafter.

Since the government cannot recover upon a claim of right of the Yakima Indian nation as an entity, but only as the trustee for several individual Indians who hold trust patents respectively, the claim of each respective owner must be specifically set up and proved, and further there must be proof of acts of some defendant or defendants which interfere with the trust owners of particular pieces of property, before the government can require any land-owner north of the boundary to plead or prove his claim to ownership of a water right.

Further pre-trial conferences and trial, if need be, will be had to accomplish these purposes, if the government requests such action. If no motion is made within a reasonable time, the cause will be dismissed on the merits, since the government has failed to prove a water right reserved for any specific tract and has failed to prove that any of its wards have been injured by any defendant.

The appropriate record may be presented to the Court by defendants.

SUPPLEMENTAL OPINION

The lawyers for the government demand clarification of the original opinion, pointing to some minor errors which have now been corrected. Throughout this case, these lawyers have been driven

by a blind obsession that they could turn the clock back for one hundred years and take away from owners of land patented to them by the United States vested rights appurtenant to each parcel under the municipal law of the state without compensation.^①

This Court has consistently held, as was held in the opinion which these lawyers request the Court to explain to them, that water rights appurtenant to such lands could be questioned only by the owner of a particular parcel who alleged and proved affirmatively that he owned a water right prior in time and

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superior in right to that of *the one who has proved to have interfered with his enjoyment of the usufruct. Because such individual claims were neither pleaded, set forth in the pre-trial order, nor proved, the Court held that the patentees of lands outside the reservation on which water was being used were not required affirmatively to set up and prove their own claims.

It is axiomatic that, in all litigation over real estate, the plaintiff must recover on the strength of his own title. There are two advantageous aids. If plaintiff has title deeds which vest him with ownership in fee even if he be out of possession, or if, on the other hand, he claims ownership and is in actual possession, he may demand that the adversary allege and prove facts showing adverse claim.

^① See for similar persistent and unreasoning zeal *United States v. Walker River Irr. Dist.*, D. C. Nev., 11 F. Supp. 158 and particularly *United States v. Walker River Irr. Dist.*, D. C. Nev., 14 F. Supp. 10.

This proceeding is not, as these lawyers seem to believe, of a kind with quo warranto brought by the Crown against these defendants for usurpation on the theory that *nil tempus occurrit regi* and to lie rebutted only by affirmative and independent proof by muniments of a title unquestioned since the mind of man runneth not to the contrary and specifically to the time of the accession of Richard I, of glorious memory, in the year of Our Lord, 1187.

The lawyers for the government did not present a claim for any individual tract of land as trustee of the naked legal title for the equitable owners who are Indians. The body of lands have been allotted in severalty to respective Indian owners. Neither did they allege, claim or prove by written documents title to any specified water right appurtenant to a particular allotment. On the other hand, they did not plead, claim or prove possession by user and beneficial application of any defined water right on any allotment.^②

Instead, although the theories have never been exactly defined, these lawyers seem to claim a water right for the entire body of irrigable land on the reservation in this watershed. Although this is disclaimed, such a pretension cannot be supported ex-

^② The government showed, as to each parcel involved herein, the date of allotment, the present owner, the number of acres irrigated and the date of first irrigation, the number of irrigable acres and the ditch or ditches serving each parcel. It set forth a claim of 4.4 acre feet for each irrigable acre. There is nothing in the record to establish the amount of water beneficially used on each parcel or the date of first use of any specified amount. Specifically, there is nothing in the record to indicate that 4.4 acre feet has ever been used beneficially on any acre within the reservation.

cept as a claim to the entire flow of the Ahtanum for the entire body of reservation land. The basis of this claim is that the makers of the Treaty of 1855, signed by commissioners of the government and certain headmen of the confederated tribes, reserved the waters of the Ahtanum in perpetuity for whatever use might be devised for them in centuries to come. There is no doubt the United States, as owner and sovereign of the whole area, might have so reserved both the land and all the water. The Court held, in the opinion, that the language of the treaty would not bear such a construction. The Court held as a fact that no intention of the treaty makers which envisaged any application of water in quantities could be implied from the circumstances surrounding the creation of the reservation. The Court held that necessity would imply that the parcels touching the river bank be not deprived of water for cooking and domestic uses, irrigation of gardens and the watering of stock. No claim, however, was made on this basis for any parcel.

The lawyers for the government say they do not claim the entire flow of the stream, but only 4.4 acre feet per acre per annum for each acre of the entire body of irrigable land—in other words, nearly 22,000 acre feet—which is more water than the entire stream of the Ahtanum flows during any irrigation season. Again, the claimed basis of this afterthought

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is the Treaty of 1855. The *Court held that specific measurement of water for beneficial use on a parcel

of land is a characteristic of the custom of miners developed in the gold fields of California in 1848. This miners' custom was not adapted for use in irrigating agricultural lands until some years thereafter.

The short answer to the proposition that water was appropriated for the use of this entire tract is that the doctrine of appropriation required continuous beneficial application of the corpus of the water upon the particular tract of land. No one pretends to say that any amount over one quarter of the flow of the Ahtanum was ever given application on any portion of this tract during all the hundred years since the treaty.^③ The lawyers for the government did not prove title to and did not prove possession of the corpus of the water at any time to give color to their present claim.

The Court held such an appropriation was not contemplated by the treaty makers in 1855. Long after and in 1866, the government first recognized the doctrine of appropriation as available against government rights. It is true that the doctrine of appropriation, after it was developed, protected a party who gave open and public notice of intention to appropriate a specific quantity of water and who within a reasonable time thereafter commenced works sufficient to carry the specified amount of

^③ In order to bolster its claim, the government in recent years has split up the water to which certain allotments may have been entitled under the law of prior appropriation and has spread it over the entire area of irrigable land within the reservation.

water, and thereafter, also within a reasonable time, actually made beneficial application of the entire amount claimed to the body of land in question.

There was no such intention evinced by the treaty, as the previous opinion points out. There were only sporadic appropriations by individual Indians for the benefit of particular tracts before the state was admitted to the Union. As noted above, there has never been use of the amount of water now claimed on the whole body of the reservation. Neither the United States nor the Indians have built works to this day which are capable of carrying the amount of water now claimed during the irrigation season.

Two events happened near the same time which negative the present claims of the agents. First, in 1889, the State of Washington was admitted to the Union. Second, after 1887, the bulk of the lands of the Yakima Indian Reservation were allotted in severalty.^④ The Court held, in the opinion, that Washington was admitted on an equal footing with the original thirteen states, and that, while the state must recognize vested rights, her people could enact a municipal law governing the fields of real property and water rights, which would be binding upon all, including the United States. Thereafter, except for rights vested before that date, water rights could not become appurtenant to lands to which even the United States held title unless the local statutes and

^④ The Act authorizing the allotment of lands within the Yakima Indian Reservation was passed in 1887, 24 Stat. 388. Allotment of such land was substantially completed in 1898.

law were followed. The government, as landowner, whether in its own right or as trustee of a particular tract for an individual Indian allottee, held under the same incidents as an individual owner of property in the state. The Court held that the government agents had neither reserved the entire flow, made an appropriation therefrom, nor evinced an intention of making an appropriation for the entire body of such lands before the state was admitted to the Union.

After the admission of Washington to the Union and the allotment of the lands in severalty, water rights could only become appurtenant to particular parcels thereof.

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*By administrative acts, the government officers and agents negatived the broad claims now put forward. First, in 1908, after the state law was paramount as to water rights, a Secretary of the Interior, who was on the ground and was in possession of the facts, approved the allocation of the water of the Ahtanum three-fourths to the landowners off the reservation and one-fourth to the allottees of the reservation. Second, in 1925, the United States Attorney of the District acquiesced in the adjudication of the waters of the Ahtanum among the owners off the reservation provided there was no attempt to settle the priorities between them and the one-fourth of the flow which was being applied within the limits of the reservation.

The Court held such acts have important consequences. They show that there was no intention to

make the claim here until a false construction of the Winters case awakened the power-grasping instincts of the bureaucrats. In addition, each was a definite administrative construction of the treaty and rights of the government, the Indians, and those patentees of lands outside the reservation, which cannot now be reversed.

The Court believes from the proof in the record that claims could be defined for many of these parcels under the riparian doctrine or under the theory of beneficial appropriation which the Court would enforce. Therefore, a further pre-trial conference was ordered in order to define these claims. The Court recognizes that, by their acts, the agents of the government may have prejudiced the claims of some of these parcels. It may be that riparian lands on the lower portions of the stream have acquiesced so long in the water being used elsewhere that their rights may now be lost. It is also indicated that the agents may have taken water rights in part from particular parcels which had a prior appropriation and given these to other parcels which had no such rights. This was a violation of local law and a wrong to the individual ward, of which no trustee should have been guilty. The progressive enlargement of the system serving reservation lands after 1908, the addition of new ditches until 1915 at least and the successive new lands watered since 1908 with the same amount of water indicate abandonment by the United States and individual allottees of the right

to water which has been beneficially used on other allotments.

The lawyers for the government realized the difficulty with their present position when they came to consider the situation of the patentees of what were formerly reservation lands. Such parcels were no longer in government ownership, but had been patented long after many of the lands outside the reservation. Likewise, some of them may have had early water rights. If these were included as plaintiffs, which was logical, the right enforced by the agents would not be a strictly Indian right. Besides, it would place these late buyers of land parcels in a favored position over the pioneer patentees direct from the government who had been beneficially applying this water for over sixty years in building an empire out of the wilderness. On the other hand, it could be claimed that the water right was strictly an Indian right which did not pass to a white purchaser. The dilemma has no solution. These subsequent transferees of Indian lands, of course, claimed by right of the original sovereignty of the government. But the lawyers for the government took no position. Therefore, the necessity for further pre-trial conferences is manifest.

If the lawyers for the government persist in the recalcitrant attitude and policy of obstruction which has been adopted all through the case, the complaint will be dismissed for want of prosecution.



No. 14742.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

mitsugi NISHIKAWA,

Appellant,

vs.

JOHN FOSTER DULLES, as Secretary of State,

Appellee.

Appeal From the United States District Court for the
Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF.

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No. 14742.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

mitsugi NISHIKAWA,

Appellant,

vs.

JOHN FOSTER DULLES, as Secretary of State,

Appellee.

Appeal From the United States District Court for the
Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF.

Statement of Pleadings and Facts Disclosing Jurisdiction.

The complaint [R. 3] was filed pursuant to Section 503 of the Nationality Act of 1940 (8 U. S. C. (1946 Ed.) 903; 54 Stat. 1171)¹ giving the District Court for the Southern District of California, in which appellant claimed permanent residence [R. 3], jurisdiction over an action for a declaration that a person who has been denied a right or privilege as a national of the United States [R. 4] is a national of the United States.

¹Preserved by the Savings Clause, Section 405a of the Immigration and Nationality Act of 1952; note to 8 U. S. C. 1101; 66 Stat. 280.

This is an appeal from a judgment entered by the District Court [R. 14-15] adjudging that appellant, who was born in the United States [R. 14], lost his United States citizenship by serving in the Japanese Army, and denying appellant's prayer for judgment that he is a national of the United States. [R. 15.]

This court has jurisdiction of the appeal under the provisions of 28 U. S. C. 1291 and 1294(1).

Statement of the Case.

Statutes.

8 U. S. C. 801(c) provides in pertinent part:

“A person who is a national of the United States . . . by birth . . ., shall lose his nationality by:

(c) Entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state;”

Section 1 of the 14th Amendment to the United States Constitution provides in pertinent part:

“All persons born . . . in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. . . .”

The Fifth Amendment provides in pertinent part:

“No person shall . . . be deprived of life, liberty, or property, without due process of law; . . .”

Facts.

Appellant was born in Artesia, California on April 20, 1916 [R. 10]. He was thus by United States law (14th Amendment) and by Japanese law [R. 34] a citizen of both countries by birth.² Until he went to Japan in August, 1939 [R. 18], appellant lived all of his life in the United States and was educated in the schools in the United States [R. 18]. In 1939 appellant went to Japan in order to visit and study, intending to remain between two to five years [R. 26]. His mother and father remained in the United States [R. 29, 30]. He travelled on an American, not a Japanese, passport [R. 39-40].³

When he got to Japan, appellant started to study under a tutor in Japanese language [R. 35], he not being able to read Japanese characters [R. 29], but when his father died in November, 1939 [R. 35], he had no funds and so had to go to work (*Ibid*). Around June, 1940, pursuant to the Japanese compulsory military conscription law [R. 22, 23] he was required to take a physical examination

²There is no evidence in the record as to the nationality law of Japan nor as to any of the facts necessary to make one a Japanese national under Japanese law. Save for appellant's own testimony that he was a national of Japan [R. 34], admittedly a conclusion, there is no evidence in the record to support an indispensable element of appellee's case, namely, that appellant had, or acquired Japanese nationality. (8 U. S. C. 801(c).) However, despite the fact that foreign law is a question of fact which must be proved (*Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U.S. 397, 9 S. Ct. 469, 32 L. Ed. 788) appellant agrees that he was born of a Japanese father and therefore, under Japanese law (Art. I, Japanese Nationality Law; Law No. 66 of 1899, as amended by Law No. 27 of 1916 and Law No. 19 of 1924) was a national of Japan.

³The trial court refused to admit the passport application, which showed on its face that Passport No. 44632, San Francisco Series, was issued to appellant, into evidence [R. 41]. Under *Fong Wong Jing v. Dulles*, 349 U.S. 941, this was error.

[R. 18] and on March 1, 1941, pursuant to the same law, he was drafted into the army (*Ibid*).

When he received the notices to report for physical examination and to report for induction, he was afraid not to comply because he heard rumors that the Kempei Tei⁴ would throw persons who tried to dodge the draft into prison [R. 37], or beat them [R. 47] and he even heard of one case of a boy who was bayoneted by them and killed [R. 37].

At the time here involved, the government of Japan was tyrannical and despotic, with the military controlling the country. Appellant testified to this condition pointing out that even high officials were killed in their homes [R. 37]. The police made monthly checks of the boarding house where appellant lives [R. 44].⁵

The tyranny extant in Japan during this time is a matter of such common knowledge that this court can take judicial notice thereof.⁶ It was under these circumstances that appellant obeyed the Japanese law.

⁴The Kempei Tei were the dreaded Japanese military police which held the people in Japan generally in fear. See *Kanno v. Acheson*, 92 F. Supp. 183, 184 (D.C. S.D. Cal., 1950); *Kato v. Acheson*, 94 F. Supp. 415, 416 (D.C. S.D. Cal., 1950). And cf. *Fukumoto v. Dulles*, 216 F. 2d 553, 555 (C.A. 9, 1955) and the Murayama deposition therein referred to.

⁵Cf. Page 3, Murayama deposition in *Fukumoto v. Dulles*, 216 F. 2d 553, detailing the surveillance under which Nisei were kept by the police.

⁶For the purpose of aiding the court in its judicial knowledge, we have lodged with the clerk of this court certain documents the contents of which this court can take judicial notice. These documents are:

1. "Education in the New Japan," published by Supreme Commander for the Allied Powers (SCAP), Civil Information and Education Section, Tokyo, 1948;

While in the army, appellant was asked by non-commissioned officers, because he was born and raised in the United States, what he thought would be the outcome of the war [R. 38]. He replied that "there wouldn't be any chance of Japan winning the war at all." [R. 38.] For this indiscretion, he "was called up by the enlisted personnel of higher rank and . . . given a thorough beating." (*Ibid.*) After that he was beaten about every day for a month and a couple days each month following. (*Ibid.*) While he was in the army, his nickname was "America." (*Ibid.*) He was discharged at the end of the war [R. 19].

After the war, appellant was denied a passport to return to the United States by the American Consulate at Yokohama on the ground that he had lost his United States citizenship by reason of his service in the Japanese Army [R. 12].

Hence this law suit.

2. SCAP, Summation of Non-Military Activities in Japan and Korea, No. 3, December, 1945;

3. SCAP, Summation No. 1, September-October, 1945;

4. SCAP, Two Years of Occupation, Tokyo, 1947;

5. SCAP, A Brief Progress Report on the Political Reorientation of Japan, Tokyo, 1949;

6. Deposition of Kiyoshi Togosaki;

7. Deposition of Tamotsu Murayama;

8. Deposition of Hidemitsu Matsuki.

Some, or all, of these documents were introduced and received in evidence in numerous cases involving the issues of this case. *E. g. Kato v. Acheson*, 94 F. Supp. 415 (D.C. S.D. Cal., 1950); *Kanno v. Acheson*, 92 F. Supp. 183 (D.C. S.D. Cal., 1950); *Yoshida v. Dulles*, 116 F. Supp. 618 (D. C. D. Haw., 1954).

As to the official publications of SCAP (items 1 through 5), it is clear that this court may take judicial notice of their contents by reason of that fact alone. As to the depositions (items 6-8), they being part of the records of the district courts of this circuit (and having been admitted into evidence usually without objection; the

Questions Involved.

1. Did the Government carry its burden, whether that burden be to show the expatriation of this American born citizen by clear, convincing, unambiguous evidence to have been voluntary, or whether its burden was to overcome the presumption that appellant's military service was involuntary by reason of his having been drafted into the Japanese Army pursuant to the compulsory Japanese Military Service Law? And, irrespective of what the Government's burden may be, was appellant's military service voluntary?

Mitsuki deposition, indeed, being taken by the Government) notice may be taken thereof as well. These principles are substantiated in the following cases:

N. L. R. B. v. E. C. Atkins Co., 331 U.S. 398, 406, where the Supreme Court took judicial notice of the contents of a circular issued by Headquarters, Army Service Forces. The court said:

"Circular No. 15 was not introduced into evidence in the proceeding before the Board. But it was issued by military authorities pursuant to the power vested in the Secretary of War by Executive Order No. 8972 and we may take judicial notice of it. *Standard Oil Co. v. Johnson*, 316 US 481, 483, 484."

Stainback v. Mo Hock Ke Lok Po, 336 U.S. 368, 375, where the court took judicial notice of a practice in the administrative office of the United States courts; *Tempel v. United States*, 248 U.S. 121, 126, where the court took judicial notice of the contents of reports of the Secretary of War. In *Standard Oil Co. v. Johnson*, 316 U.S. 481, 483, 484, the court took judicial notice of an order of Army Headquarters establishing post exchanges.

That this is the view of the Government is seen from its brief in *Hirabayashi v. United States*, 320 U.S. 81, where at page 11 it is said that "facts (appearing) in official documents . . . are peculiarly within the realm of judicial notice" citing innumerable cases.

See also as to the right to notice the facts revealed by the records of the District Court: *Savage v. U. S. District Court*, 144 F. 2d 575 (C.C.A. 9, 1944); *Armstrong v. Alliance Trust Co.*, 126 F. 2d 164, 167 (C.C.A. 5, 1942)). And compare *Falbo v. United States*, 320 U.S. 549, 553, f.n. 7.

2. Should 8 U. S. C. 801(c) be interpreted so as to impose expatriation upon native born citizen under the facts of this case—namely, obedience to the laws of a foreign country by a citizen of that country temporarily residing therein?

3. On its face, and as applied in this case, is 8 U. S. C. 801(c) constitutional under the citizenship clause of the 14th Amendment and under the due process clause of the 5th Amendment?

Specification of Errors.

1. The trial court erred in giving judgment for the appellee [R. 15];

2. The trial court erred in failing to adjudge that appellant is a national of the United States and that he did not lose that nationality by reason of his having served in the Japanese Army [R. 15];

3. The trial court erred in finding [III; R. 11] that when appellant journey to Japan in 1939, he knew at that time he was likely to be called for military service in the Japanese Armed Forces. There is no evidence in the record to support this finding, the finding is not supported by the evidence, and it is clearly erroneous.

4. The trial court erred in finding [VII; R. 12] that it is not true that appellant's service in the Japanese Army was the result of coercion and was not his free and voluntary act. There is no evidence in the record to support this finding, the finding is not supported by the evidence and it is clearly erroneous;

5. The trial court erred in finding [VIII; R. 12] that appellant's entry and service in the Japanese Armed Forces was his free and voluntary act. There is no evidence in the record to support this finding. The finding is not supported by the evidence and it is clearly erroneous;

6. The court erred in its conclusion [III; R. 13] that appellant lost his nationality under Section 401(c) of the Nationality Act of 1940. Appellant's act was not voluntary; hence it could not be expatriating. But even if appellant's act was voluntary, the section, as applied to the facts of this case—a dual citizen obeying the law of the country in which he is—should be construed so as not to apply, in order to avoid unconstitutionality. If applied to this case, it is unconstitutional under the 5th and 14th Amendments, as well as so unconstitutional on its face.

7. The court erred in refusing to admit into evidence [R. 41] plaintiff's exhibit 3 for identification [R. 39-40]. The grounds urged at the trial for the objection were "that the document is a statement made by the plaintiff at some future time and is self-serving and immaterial and irrelevant." [R. 41.] The full substance of the evidence rejected is the passport application of appellant just before he went to Japan in 1939 and showing thereon that an American passport was issued to him by the United States Department of State.

8. The court erred in ruling [R. 59] that 8 U. S. C. 801(c) is constitutional.

ARGUMENT.

Preliminary Statement.

Under any view of the facts or law, the decision below is erroneous. It is completely out of line with a vast body of cases dealing with purported loss of citizenship under Section 401(c), as well as with decisions of this court on related matters (*e. g.*, *Fukumoto v. Dulles*, 216 F. 2d 553), and most recently, of the United States Supreme Court (*e. g.*, *Gonzales v. Landon*, No. 111, Oct. Term 1955, 24 L. W. 3164, 100 L. Ed. (Adv. Op.) 136).

Summary of Argument.

1. There can be no expatriation from American citizenship unless the citizen acts voluntarily. In cases such as these the Government's burden is to show such conduct by evidence that is clear and convincing and not such as to leave the issue in doubt. Such evidence the Government did not produce here. Indeed, in this case, the Government introduced no evidence whatsoever. At the least, the Government's burden is to overcome the presumption that appellant acted involuntarily. Since appellant was drafted into the Japanese Army pursuant to law, the presumption is that his service was involuntary. Accordingly, judgment must be for the citizen since the government produced no evidence overcoming the presumption. In any event, on the ordinary burden of proof, appellant showed his service to have been involuntary. The trial court's holding to the contrary is clearly erroneous.

2. Following accepted principles, the statute involved in this case should be so construed as to avoid a constitutional issue. Since appellant had Japanese nationality, resided in Japan at the time and acted pursuant to the law of the country in which he was residing, Section 401(c) should not be construed to apply to such facts. If the statute is construed to apply to such facts, it is unconstitutional because Congress has no power to take away constitutionally endowed citizenship absent consent of the citizen with knowledge of the consequences.

I.

Appellee Did Not Meet the Burden Required of Him in Order to Take Away Appellant's United States Citizenship.

A. In Order to Take Away One's United States Citizenship, the Burden Is Upon the Government to Prove by Clear, Convincing and Unequivocal Evidence All the Elements of Expatriation.

This court has expressed itself, on a number of occasions on the general question of expatriation from United States citizenship. (See, *e. g.*, *Acheson v. Murakami*, 176 F. 2d 953; *McGrath v. Abo*, 186 F. 2d 766; *Fukushima v. Dulles*, 216 F. 2d 553; *Kawakita v. United States*, 190 F. 2d 506, *aff'd* 343 U.S. 717; *Takehara v. Dulles*, 205 F. 2d 560; *Attorney General v. Ricketts*, 165 F. 2d 193.) From these and other cases these principles emerge: there can be no expatriation unless there is a voluntary renunciation or abandonment of nationality; citizenship is a precious right that cannot be lightly taken away; ambiguous or equivocal conduct is not sufficient to cause loss of citizenship; United States citizenship is not to be taken away or deemed forfeited except in the

clearest cases; the evidence in this regard must be clear, unequivocal and convincing, and not by a mere preponderance which leaves the issue in doubt. (*Cf. Perkins v. Elg*, 307 U.S. 325; *Gonzales v. Landon*, No. 111, U.S. Sup Ct., Oct. Term, 1955, 24 L.W. 3164; *Dos Reis, ex rel. Camara v. Nicolls*, 161 F. 2d 860 (C.C.A. 1, 1947); *Podea v. Acheson*, 179 F. 2d 306 (C.A. 2d, 1950); *Schneiderman v. United States*, 320 U. S. 118, 125; *Baumgartner v. United States*, 332 U.S. 665, 670; *Mandoli v. Acheson*, 344 U.S. 133, 193; *Acheson v. Maenza*, 202 F. 2d 453 (C.A. D.C., 1954); *Monaco v. Dulles*, 210 F. 2d 769 (C.A. 2, 1954).)

This means that the Government must show, and by the strict standard of proof required, not only that the citizen performed the physical acts denounced by the expatriating statute,⁷ but also, and by the same heavy degree of proof, that other all important element: that he did so voluntarily. It is the Government's burden, when it seeks the immense forfeiture it does here, to prove voluntary conduct, rather than the citizen's burden to prove involuntary conduct. (*Augello v. Dulles*, 220 F. 2d 344, 345 (C.A. 2, 1955); *Lehmann v. Acheson*, 206 F. 2d 592, 598 (C.A. 3, 1953); *Schioler v. Secretary of State*, 175 F. 2d 402, 403 (C.A. 7, 1949); *Gonzales v. Landon*, 24 L.W. 3164.) That the Government followed the incorrect view of the law on this point is seen from the fact that it introduced not one single shred of evidence in the case, thus obviously being content to rest on the theory that *appellant* did not prove his case. That the court

⁷Here, that he served in the armed forces of a foreign state and had the nationality of that state; two elements which are not in dispute.

below fell into the same error is seen from the fact that as soon as appellant had rested, the court immediately asked Government counsel whether he rested [R. 49] to which an affirmative reply was made [R. 50].

This circuit has not directly passed upon the question. In *Attorney General v. Ricketts*, 165 F. 2d 193, 195, this court would not permit expatriation based upon equivocal conduct. In *Fukumoto v. Dulles*, 216 F. 2d 553, the appellant there urged the point upon this court (216 F. 2d at 554). This court did not reach the question, however, because it held that on the ordinary burden of proof the appellant had shown that he had acted involuntarily.⁸ Accordingly it reversed on the facts because the trial court "had no proper realization of what motivation drove Fukumoto to apply for Japanese citizenship." (216 F. 2d at 555.)

However, last month, in *Gonzales v. Landon*, No. 111, Oct. Term 1955,U.S....., 24 Law Week 3164, the Supreme Court, reversing this court's decision in the case (215 F. 2d 955), settled the question in favor of appellant. The Supreme Court's *per curiam* opinion is as follows:

" . . . The Court is of the view that the standard of proof required in denaturalizations cases (see *Schneiderman v. United States*, 320 U.S. 118; *Baumgartner v. United States*, 322 U.S. 665) is applicable to expatriation cases arising under §401(j) of the Nationality Act of 1940, 54 Stat. 1137 as amended

⁸There the Government claimed expatriation under 8 U. S. C. 801(a) where the citizen had actually become a naturalized Japanese citizen or, at least re-acquired Japanese nationality which he formerly had had.

and has not been satisfied in this case. Accordingly the judgment below is reversed without reaching the constitutional questions that have been presented.”

An examination of the briefs in the *Gonzales* case discloses extensive briefing of the very question as to the necessity for the Government proving the conduct to be voluntary, and whether the Government had so proved by the strict standard of proof required. As seen, the Supreme Court held the burden to be on the Government and that it had not been met.

It is true that the *Gonzales* case, and the Supreme Court's decision, dealt only with Subsection (j) of Section 401 of the Nationality Act of 1940. But there is no basis in logic, and certainly not in law, for allowing the Government to expatriate a citizen under subsection (c) on any lesser degree of proof. Under no view or provision of law can there be expatriation unless the conduct is voluntary.⁹ And by *Gonzales* the Supreme Court has made it clear that the burden of proof of this element as well lies with the Government and by evidence that is clear, convincing, unequivocal and leaving no troubling doubts.

That the Government failed in the case at bar to prove its case is, we believe, clear beyond peradventure of doubt.

⁹So held by this circuit under subsections (a)(e) and (i) of 8 U. S. C. 801; (*Fukumoto v. Dulles*, 216 F. 2d 553; *Attorney General v. Ricketts*, 165 F. 2d 193; *Takehara v. Dulles*, 205 F. 2d 560; *Acheson v. Murakami*, 176 F. 2d 953; *McGrath v. Abo*, 186 F. 2d 766) and by the United States Supreme Courts and the Circuit Courts of the First, Second and Third Circuits and of the District of Columbia under subsection (c) involved in this case. (*Mandoli v. Acheson*, 344 U.S. 133; *Dos Reis ex rel. Camera v. Nicolls*, 161 F. 2d 860; *Augello v. Dulles*, 220 F. 2d 344; *Lehmann v. Acheson*, 206 F. 2d 592; *Acheson v. Maenza*, 202 F. 2d 453.)

In this case, indeed, as noted, the Government produced no proof at all, to say nothing of its having produced evidence of the convincing nature required.

B. On the Ordinary Burden of Proof, Even If Appellant Had One Here, His Service in the Japanese Army Was Involuntary.

(1)

MILITARY SERVICE BY REASON OF CONSCRIPTION, CREATES A REBUTTABLE PRESUMPTION OF INVOLUNTARINESS. APPELLEE DID NOT OVERCOME THIS PRESUMPTION.

There is no dispute about the fact that appellant was drafted in the Japanese Army [R. 18, 56, 57] under the compulsory military service law which provided criminal penalties for violation thereof [R. 22-23]. The law, under this state of facts is that, at the very least, the entry and service in the army creates a rebuttable presumption of involuntariness, and, since the appellee did not overcome this presumption, entitles appellant to judgment.

In *Lehmann v. Acheson*, 206 F. 2d 592, 594 (C.A. 3, 1953), the court said:

“Conscription into the Army of a foreign government of one holding dual citizenship is sufficient to establish *prima facie* that his entry and service were involuntary . . .

“Upon consideration of the record we are of the opinion that the District Court erred in its determination that Lehmann had expatriated himself from United States citizenship. The Government has failed to rebut the presumption that his entry and service in the Swiss Army as a result of his conscription were involuntary.”

Accord:

Perri v. Dulles, 206 F. 2d 506 (C.A. 3, 1953);

Augello v. Dulles, 220 F. 2d 334 (C.A. 2, 1955).

These cases are doubly important because they reversed trial courts which had found for the Government factually on the issue of duress.

This concept in different language had previously been concurred in by the Attorney General in his opinion (41 Ops. Atty. Genl. No. 16), quoted from and approved by the Supreme Court in *Mandoli v. Acheson*, 344 U.S. 133, 135. In another part of this opinion, the Attorney General said:

“ . . . Generally, it may be assumed that an act performed under legal compulsion lacks the voluntariness of choice that is essential to accomplish expatriation . . . ”

Noting the anomalous position of the Government in the *Lehmann* case as compared with its concession in the *Mandoli* case, 344 U.S. 133,¹⁰ the court said (206 F. 2d 599):

“We can see no valid reason for making any distinction between service by conscription in the Swiss Army, for in both instances the conscript acts under compulsion of law and the duress sanctions in the event of non-compliance.”

In *Adams v. Maryland*, 347 U.S. 179, the United States Supreme Court affirmed, in effect, what the Court of Appeals had said in the *Lehmann* and *Perri* cases. In the *Adams* case the Supreme Court recognized that one

¹⁰With which the Supreme Court agreed: “The choice of taking the oath or violating the law was, for a soldier in the army of Fascist Italy, no choice at all.” (344 U.S. at 135.)

who appeared before a Senate investigating committee by virtue of having been subpoenaed did not act voluntarily. The court said (347 U.S. at 181):

“ . . . He was not a volunteer. He was summoned. Had he not appeared he could have been fined and sent to jail.”

This court in *McGrath v. Abo*, 186 F. 2d 766, 772, held, in a factual situation not dissimilar to the case at bar (*Cf. Fukumoto v. Dulles*, 216 F. 2d 553, 555) that

“ . . . a rebuttable presumption arises as to those confined at Tule Lake that their acts of renunciation were involuntary.”

Accordingly, we submit, that as a matter of law, since appellee failed to overcome the presumption of involuntariness, appellant is entitled to a reversal.

(2)

EVEN WITHOUT THE PRESUMPTION, APPELLANT ESTABLISHED THAT HIS SERVICE WAS INVOLUNTARY. THE TRIAL COURT'S FAILURE TO SO HOLD WAS CLEARLY ERRONEOUS.

The evidence is that, not only did appellant respond to the draft call because required to do so by law, but that he feared drastic treatment at the hands of the Kempei Tei if he failed to so do [R. 37, 47]. This evidence, when viewed against the background of totalitarian, militaristic, tyrannical Japan,¹¹ shows coercion and compulsion

¹¹We have set out in Appendix “A” a few excerpts from official and other authoritative accounts of the nature of Japan at the time here involved. Fuller extracts have been lodged with the clerk of this court. (See footnote 6, *supra*.) This court can take judicial notice of their contents. (*N. L. R. B. v. E. C. Atkins Co.*, 331 U.S. 398, 406; *Standard Oil Co. v. Johnson*, 316 U.S. 481, 483, 484; *Tempel v. United States*, 248 U.S. 121, 126; *Stainback*

of the strongest nature,¹² and courts which have considered the matter in similar cases have so recognized.

v. Mo Hock Ke Lok Po, 336 U.S. 368, 375; page 11 of brief for Government in *Hirabayashi v. United States*, 320 U.S. 81; *Maritime Union v. Herzog*, 78 F. Supp. 146 (D.C. D.C., 1948), aff'd 334 U.S. 854:

"We judicially know the facts of current history and cannot close our eyes to them and to their significance."

United States v. Kusche, 56 F. Supp. 201, 206 (D.C. S.D. Cal., 1944):

"A proposition which is common knowledge, and of which the court can take judicial notice, viz., that when Hitler came to power in 1933 he suspended the personal liberty provisions of that Constitution and thereupon and thereafter he established an absolute dictatorship based upon the tenets of national socialism."

Other cases in accord are: *Ex parte Milligan*, 4 Wall. (U.S.) 2, 18 L. Ed. 281, 296 (that the federal authority in Indiana was always unopposed); *The Appollon*, 9 Wheat. (U.S.) 362, 374, 6 L. Ed. 111, 114 (that smugglers infested that particular area); *Ponce v. Roman Catholic Church*, 210 U.S. 296, 309 (of the history of Porto Rico and its legal and political institutions up to the time of its annexation by the United States); *DeWitt v. Wilcox*, 161 F. 2d 787 (C.C.A. 9, 1947), cert. den. 332 U.S. 763 (military problems facing General DeWitt during the war); *Ex parte Zimmerman*, 132 F. 2d 442, 445 (C.C.A. 9, 1952), cert. den., 319 U.S. 744 (that the Hawaiian Islands and the Pacific area of the United States were faced with an imminent threat of invasion at the beginning of the war); *Hunter v. Wade*, 169 F. 2d 973, 976 (C.A. 10, 1948), aff'd 336 U.S. 634, reh. den. 337 U.S. 921 (that during the war in Europe the United States armed forces were moving rapidly and conditions in the field were fluid); *In re Bush*, 84 F. Supp. 873 (D.C. D.C., 1949) (that on the surrender of Japan the American armed forces occupied Japan); *Gualtieri v. Sperry Gyroscope Co., Inc.*, 67 F. Supp. 219, 221 (D.C. E.D. N.Y., 1946) (of industrial condition which existed in the nation during the period immediately before the war and during the war); *Tidmore v. Mills*, 32 So. 2d 769, 777 (Court App. Ala., cert. den. 32 So. 2d 782); *Atchison, T. & S. F. R. Co. v. United States*, 284 U.S. 248, 260; *Skendzel v. Rose Manor Realty Co.*, 80 F. Supp. 619, 622 (D.C. E.D. Wisc., 1948); *The Pietra Campanella*, 73 F. Supp. 18, 27 (D.C. D. Md., 1947).

¹²Cf. *Acheson v. Maenza*, 202 F. 2d 453, 459 (C.A. D.C., 1953): "That testimony must be considered in connection with the well-known ruthlessness of the Fascist regime which, even as early as 1935, would hardly have tolerated resistance to its draft laws by an admitted national of Italy."

In *Kanno v. Acheson*, 92 F. Supp. 183 (D.C. S.C. Cal. 1950), the court said:

“For some years prior to Pearl Harbor and until the surrender of Japan in 1945, Japan and its people were under the control of the military authorities of Japan, and the Secret or Thought Police, and the Special Higher Police; and during that period the people of Japan were generally in fear of them and particularly in fear of physical punishment, from the Japanese military authorities, the Secret Police and the Special Higher Police.”

In *Kato v. Acheson*, 94 F. Supp. 415, 416 (D.C. S.D. Cal., 1950), it was said:

“. . . the plaintiff, and other young American-born Japanese, before the war was on and thereafter, found themselves in an atmosphere in Japan of being dominated by a cruel and unjust military government although they had only gone to Japan to receive an education, and their desire and intention was to return to the United States, but were refused a passport. Their situation there is clearly reported as to such circumstances in the official report of General MacArthur to the United States after an investigation. He, after making an investigation, found that the military forces of Japan prior to and until Japan surrendered, ruthlessly and brutally dominated Japan regardless of the rights of all, and it is easy to ascertain the dominating atmosphere and situation this plaintiff and others were in which the military forces of Japan arbitrarily dominated.”

In *Morizumi v. Acheson*, 101 F. Supp. 976, 977 (D.C. N.D. Cal., 1951):

“It is clear that at the time petitioner was ordered to report for army duty in 1945, he had no reason-

able choice but to do so. Nor would it be reasonable to expect him to have protested, however abhorrent such service was to him. . . . In view of what is generally known of conditions in Japan, it is not likely that he would have escaped with merely a prison sentence."¹³

The Court of Appeals for the District of Columbia, in cases decided before the Supreme Court's decision in *Gonzales v. Landon*, apparently was of the view contrary to that of the Second and Third, and apparently, the Seventh Circuits, that on the issue of voluntariness, the burden of proof was on the plaintiff (See *Alata v. Dulles*, 221 F. 2d 52 (C.A. D.C. 1955).) Nevertheless in at least half a dozen cases it reversed trial courts which, on evidence substantially identical with that here, had held for the Government.

Alata v. Dulles, 221 F. 2d 52 (C.A. D.C. 1955);
Soccodato v. Dulles, 226 F. 2d 243 (C.A. D.C. 1955);

DeMarco v. Dulles, 26 Fed. 265 (C.A. D.C. 1955);
Becce v. Dulles, 226 F. 2d 265 (C.A. D.C. 1955)
(2 cases);

Santi v. Dulles, 226 F. 2d 266 (C.A. D.C. 1955).

In these cases, and in *Acheson v. Maenza*, 202 F. 2d 453 (C.A. D.C. 1953), the District Columbia Court of Appeals recognized that the ruthless conditions in Fascist

¹³Cf., as to a similar situation in Italy, this admission by the Attorney General (41 Ops. Atty. Gen. No. 16), quoted and adopted by the Supreme Court in *Mandoli v. Acheson*, 344 U.S. 133, 135:

" . . . 'The choice of taking the oath or violating the law was for a soldier in the Army of Fascist Italy no choice at all'"

Italy, albeit each case must stand on its own facts, were such that service in the Italian Army under such conditions was not voluntary; "that the rule is strong that factual doubts are resolved in favor of citizenship" (221 F. 2d 52 at 54). See also *Monaco v. Dulles*, 210 F. 2d 760 (C.A. 2, 1954) and *Pandolfo v. Acheson*, 202 F. 2d 38 (C.A. 2, 1953).

This court has likewise recognized similar compulsions in *Fukumoto v. Dulles*, 216 F. 2d 553, where it reversed the trial court's finding of voluntary action because that court "had no proper realization of what motivation drove Fukumoto to apply for Japanese citizenship." (216 F. 2d at 555.)

The basis of the reasoning of the trial court in the instant case appears to be three-fold: (1) that appellant went to Japan himself when he was 23 years of age [R. 55]; *i. e.*, not, as in many other cases, going there as a young child; (2) that he took no steps to get out of the draft [R. 56]; (3) that he did not believe the testimony of appellant [R. 55] (The court said it would be "ridiculous" [R. 55] to believe it.) In addition, the court found [R. 11, 56] as a fact, based on absolutely not one bit of evidence in the record and in direct contradiction and disregard of the evidence [R. 25], that when appellant went to Japan, he knew he was likely to be called for military service and *wanted* to go into that service. All this, in the very teeth of the uncontradicted evidence that when appellant went to Japan, he did *not* know he was likely to be drafted in the Japanese Army [R. 25] coupled with the fact that both appellant's father and mother were in the United States when he went [R. 29, 30].

In relying upon the fact that appellant went to Japan in 1939 when he was 23 years of age (*ergo* he went “to do his duty as a Japanese national” [R. 55] [this of a boy who had lived all his life in the United States [R. 18], had been educated in the United States [R. 18], had left his parents in the United States [R. 29, 30] and could not read the Japanese language [R. 29]]!), the trial court did in reverse what this court condemned in *Takehara v. Dulles*, 205 F. 2d 560. In that case the trial court had held that *because* the plaintiff had lived most of his life in Japan, *therefore* when he voted he was simply acting as a Japanese and could not be said to have acted involuntarily. In the case at bar the trial court reasoned that because appellant had *not* lived in Japan all his life, *therefore* when he went to Japan he went “to do his duty as a Japanese national” [R. 55]. Not only is this reasoning error in law (*Takehara v. Dulles*, 205 F. 2d 560), but the conclusion is supported by not one single sentence, phrase, word or other scintilla of evidence in the record.

The second facet of the trial court’s reasoning—that he didn’t take steps to get out of the draft or to return to the United States—is likewise erroneous. This line of argument was effectively answered in *Lehmann v. Acheson*, 206 F. 2d 592, 596, where the court said:

“An analysis of the District Court’s opinion discloses that its determination was premised on acts of omission, rather than commission, on the part of Lehmann with respect to his service in the Swiss Army and attending circumstances.

“The omissions enumerated in the opinion were:

“(1) On his 1941 visit to the American consulate at Basel, Lehmann failed to furnish proof of his birth in the United States and failed to inquire how he could establish his American birth.

“(2) On that same visit he did not ask specifically for the protection of the American consulate and expressed no desire to register as an American citizen.

“(3) He did not protest at the time he entered the Swiss Army or at the time he took the oath of allegiance.

“With respect to these ‘omissions’ it need only be said that they were utterly irrelevant to the critical issue of ‘voluntariness’.”

The irrelevance of the argument is made the more apparent in *Monaco v. Dulles*, 210 Fed. 760 (C.A. 2, 1954), where the plaintiff in that case actually “ignored the warning of the State Department, made in response to Italian laws of dual nationality, to secure permission to enter Italy without liability for military service.” (210 F. 2d at 761.)

While conceding [R. 57] that appellant did not know when he went to Japan that Congress would adopt section 401(c), and that he did not know when he went into the army that he would lose his citizenship, nevertheless the court based its ruling on the theory that appellant “just refrained from protecting his rights as a citizen.” [R. 56]. To just what rights the court had reference, does not appear. If it meant a right to be excused, upon representations by the American Consulate on his behalf, from Japanese military service because he was an American citizen, even though he was also a Japanese citizen living in Japan, there is simply no such “right”. Not even the United States, which is a government of laws and not of the Kempei Tei, recognizes such a “right.” (Cf. this court’s decision in *Takeguma v. United States*, 156 F. 2d 437). Moreover, even if appealed to, the

American Consulate would make no such representation on appellant's behalf (State Department Publication No. 1316, par. 29, p. 17: ". . . (i)t is not the practice of the (State) Department to make representations in his (a dual citizen's) behalf with a view to his release from the performance of military or other obligations to the foreign country."¹⁴

Furthermore, the theory that to retain one's United States citizenship, a dual citizen, must, in effect, "elect" between one and the other, is contrary to law (*Yasui v. United States*, 320 U.S. 115; *Mandoli v. Acheson*, 344 U.S. 133).

The third element of the trial court's reasoning is that it did not believe appellant's testimony [R. 55, 56]; that it was "ridiculous" [R. 56]. This element of the case bears close resemblance to the trial court's view in *Gonzales v. Landon*. There, too, the trial court said [R. 32 of Record in *Gonzales v. Landon*, No. 111, Oct. Term, 1955 before the Supreme Court] "I don't believe his testimony" and "I don't see how such foolish statements can be made." [*Ibid.*, p. 33.]

¹⁴That the court was of the erroneous view that the appellant could, or the American Consulate would, do something about getting out of military service, is seen from these questions asked by the court [R. 48]:

"The Court: So, even though you were a United States citizen you made no effort at all to find out whether you could get out of serving in the Japanese army when you didn't want to serve in the Japanese army? They could force you to even though you didn't want to? They could force an American citizen to serve in the Army?

". . .

"The Court: And the you believed that as an American citizen that Japan could force an American citizen into the army and there wasn't anything that you could do about it, is that right? . . ."

It is not clear as to just what part of appellant's testimony the trial court did not "believe." It will be recalled that all the evidence in the case, both oral and documentary, was adduced by appellant. Thus the trial court accepted at least part of appellant's testimony. Thus the trial court believed appellant when he testified (1) that he was born in the United States [R. 10]; (2) that he claimed permanent residence in Los Angeles; (*ibid.*) (3) that he went to Japan in August 1939 [R. 11]; (4) that he was drafted into the Japanese Army [R. 24, 56];^{14a} (5) that he applied at the American Consulate at Yokohama for an American passport to return to the United States but was denied on the ground that he had expatriated himself [R. 12].

What, then, was it that the court did not believe? During its oral opinion, the court said [R. 55-56]:

"How ridiculous for me to believe his story that in the summer of 1940, when he was notified to report, that for a year he didn't do anything to leave Japan and didn't make any effort to leave Japan . . ."

As the *Lehmann* case has made clear (and it is noted that the Government did not even seek review) the view of the law suggested by this statement is erroneous. And as the Supreme Court has made clear in *Mandoli*, there is not requirement that appellant leave or try to leave the country. Indeed, in *Monaco*, the appellant there, not only did not leave Italy, but actually went there after having been warned by the State Department that he would be subject to military service and not to go without making

^{14a}The court admitted into evidence [R. 24] the stipulation as to the Japanese military law which showed that a violation of a conscription order was a crime, punishable by imprisonment [R. 23].

sure that he could enter Italy without such liability. But more than that—what did the trial court mean? Was it suggesting, contrary to the evidence, that appellant did try to leave Japan? Certainly this cannot be so because in its findings [V; R. 11] it found that appellant made no effort to return to the United States. What, then, did the trial court disbelieve? That there was a Kempei Tei in Japan [R. 37, 49]? That appellant feared what the Kempei Tei might do if he failed to obey the law [R. 37, 49]? That the military controlled the Japanese government and that even high officials were killed in their homes [R. 37]? No answer to these questions is apparent.

But the trial court did more than simply disbelieve appellant as to some part of his testimony. The court actually and affirmatively supplied evidence, none of which is in the record, and some of which is directly contrary thereto. Thus the trial court said:

[R. 55]: “(H)e (appellant) *knew* he was registered over there (Japan) in the family register.” (Italics added.)

[R. 58]: “(H)e *testifies* that he knew, that he was registered in the family register over there.” (Italics added.)

Though immaterial, it may be true that appellant knew he was registered in the family register in Japan. However, there is nothing in the record to support this evidentiary finding by the court.

The court further said [R. 58]:

“He knew he was going to be drafted.”

This view of the evidence the court incorporated in its formal findings [III; R. 11]. But the evidence is just

to the contrary as seen from this question and answer on cross-examination [R. 25]:

“Q. And you knew, did you not, Mr. Nishikawa, that if you went to Japan you were likely to be drafted in the Japanese army; is that correct?”

“ . . .

“The Witness: No, sir.”

Even if, despite that there was no reason, this answer was not believed, it furnishes no basis, there being no other evidence on the matter in the case, for affirmatively finding the contrary as the fact.

Admittedly, there is law to the effect that a trial court is not bound, under all circumstances, to accept the uncontradicted testimony of a witness. (*Quock Ting v. United States*, 140 U.S. 417, 420, 35 L. Ed. 501, 502). But the decision not to so credit the witness must be a judicial, not an arbitrary, one, and, unless there is some inherent improbability, or contradiction, or omission or some other substantial reason for doubting the witness' sincerity, the general rule that the court is bound by the uncontradicted testimony, must prevail. (*Ibid.*) There is none of these exceptional circumstances here. Moreover, not only is there no contradiction of appellant's testimony, but there is actual corroboration in the record in the form of the Japanese Military Service Law [R. 22-23]. Add to this the facts, of which judicial notice may be taken (see footnotes 6 and 11, *supra*), even if there were a balance, the weight is thrown overwhelmingly in favor of appellant. Certainly the record here does not justify the court in supplying facts which are not here. (*Cf. Mar Gong v. Brownell*, 209 F. 2d 448, 452, fn. 7.)

The gravaman of the court's error in finding the ultimate fact [III, R. 12] that appellant's entry and service in the Japanese Armed Forces was his free and voluntary act, is not that the trial court did not believe appellant, but rather the court's erroneous view of the law as to what is required of a dual national in order to avoid expatriation, coupled with an erroneous view as to what he could do. The theme of "sins of omission" runs clear through the trial court's oral opinion. Thus, in distinguishing this case from a Nisei who had gone to Japan when he was very young, the court said [R. 55]: "Of course, there wasn't anything he (such a Nisei) could do. There was no way he could leave Japan. He was drafted. He had no choice. He went into the service or he went to jail." Thus intimating that if appellant did not go into the service, he would not go to jail, and that there was a duty to risk same in any event. Again, the court said [R. 56]: "He just refrained from protecting his rights as a citizen" and *therefore*, "(H)is service could not be considered involuntary" [R. 57]. Aside from the fact that this demonstrates the court's erroneous view of the law as to where lies the burden of proof on the voluntariness issues (discussed above) these excerpts also demonstrate an erroneous view as to the duty of a dual national, in order to avoid expatriation, to fail to omit, but to do. (*Mandoli v. Acheson*, 344 U.S. 133; *Lehmann v. Acheson*, 206 F. 2d 592 (C.A. 3, 1953).)

Despite the circumstances under which appellant was drafted, the decision below violates the rule that "The law does not exact a crown of martyrdom as a condition of retaining citizenship." (*Acheson v. Maenza*, 202 F. 2d 453, 459 (C.A. D.C. 1954).) The courts have re-

jected "the adoption of a Spartan standard by which to determine whether the appellant acted voluntarily." (*Mendelsohn v. Dulles*, 207 F. 2d 37, 39 (C.A. D.C. 1953).) To paraphrase *Podea v. Acheson*, 179 F. 2d 306, 309 (C.A. 2, 1950), appellant "never voluntarily expatriated himself . . . by serving in the (Japanese) army. (This) step (was) required by the situation in which he found himself, . . ." This court, as well as the trial courts of this circuit, are in accord. (*Acheson v. Murakami*, 176 F. 2d 953; *McGrath v. Abo*, 186 F. 2d 766; *Takehara v. Dulles*, 205 F. 2d 560; *Fukumoto v. Dulles*, 216 F. 2d 553; *Ishikawa v. Acheson*, 85 F. Supp. 1 (D.C. Haw., 1949); *Kato v. Acheson*, 94 F. Supp. 415 (D.C. S.D. Cal., 1950); *Morizumi v. Acheson*, 101 F. Supp. 976 (D.C. N.D. Cal., 1951); *Murata v. Dulles*, 111 F. Supp. 306 (D.C. Haw., 1953); *Yoshida v. Dulles*, 116 F. Supp. 618 (D.C. D. Haw., 1954); *Serizawa v. Dulles*, 134 F. Supp. 713 (D.C. N.D. Cal., 1955); *Okada v. Dulles*, 134 F. Supp. 183 (D.C. N.D. Cal., 1955); *Namba v. Dulles*, 134 F. Supp. 633 (D.C. N.D. Cal.); Contra: *Kondo v. Acheson*, 98 F. Supp. 884 (D.C. S.D. Cal., 1951); *Hamamoto v. Acheson*, 98 F. Supp. 904 (D.C. S.D. Cal., 1951).)

The conclusion of the court below that appellant went to Japan wanting to get into the Japanese Army [R. 56] is just contrary to that urged (successfully) by the Government in *Kawakita v. United States*, 343 U.S. 717, where the shoe was on the other foot and the Government won out in contending in a treason case that appellant did not lose his United States citizenship, but where appellant there, also went to Japan during a time of "cold" war between Japan and the United States [R. 46].

See, also, *Yoshida v. Dulles*, 116 F. Supp. 618, 620 (D.C. Haw., 1954), where plaintiff there went at a time (April, 1941) when the war was even "colder" or "hotter," depending upon one's view of those terms.

Upon a view of the whole case, we submit, the trial court's finding that appellant acted voluntarily is "clear error." (*Acheson v. Murakami*, 176 F. 2d 953, 959; accord: *Fukumoto v. Dulles*, 216 F. 2d 553, 555, 556.)

We believe this case presents a situation where there is no evidence in the record to support the trial court's finding that appellant acted voluntarily, and hence must be reversed under the doctrine of the *Fukumoto* case, *supra*. But even if we are wrong, and, somehow, it is claimed that there is evidence in the record to support the finding, nevertheless we believe the finding is clearly erroneous and that the principle of *United States v. United States Gypsum Co.* (333 U.S. 365, applies. The court there said 333 U.S. at 395):

" . . . a finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

This is particularly true in this kind of a case in light of the Supreme Court's ruling in *Gonzales v. Landon*, 24 L.W. 3164, and the admonition by that court in *Schneiderman v. United States*, 320 U.S. 118, 122, 63 S. Ct. 1333, 1335, 87 L. Ed. 1796, where it was stated that in a proceeding to denaturalize a citizen "the facts and the law should be construed as far as is reasonable in favor of the citizen." This court follows that principle. (*Fujii v. Dulles*, 224 F. 2d 906; *Suda v. Dulles*,

224 F. 2d 908.) See also, *Bergmann v. United States*, 144 F. 2d 34, 37, 38, where this court said:

“ . . . The Supreme Court of the United States . . . in the Baumgartner case, *supra*, . . . went to great pains to distinguish the differences in consideration of the usual case and one touching the civil rights of a citizen wherein the proof, to prevail against the citizen, must be clear, unequivocal, and convincing. . . . ”

II.

Section 401(c) of the Nationality Act of 1940 (8 U. S. C. 801(c)) Is Unconstitutional.

Preliminary Statement.

The court below [R. 59] ruled that Section 401(c) is constitutional. We believe, however, that the constitutional questions need not be reached in this case because a reversal should be forthcoming under the argument made in Point I, *supra*. (See *Gonzales v. Landon*, 24 L.W. 3164.) However, in the event the court disagrees, we present the argument on constitutionality.

Appellant is aware that this court has apparently upheld the constitutionality of subsection (j) of Section 401 (now 8 U. S. C. 1481). (*Gonzales v. Landon*, 215 F. 2d 955, 957, revd. Dec. 12, 1955, U.S., 24 L.W. 3164; *Vidales v. Brownell*, 217 F. 2d 136, 138.) However, appellant feels justified in arguing the point to this court for at least three reasons.

(1) A reasonable deduction from the Supreme Court's granting certiorari in the *Gonzales* case was that it was doing so on the constitutional issue raised in the case. This was so, not only from the emphasis which was placed upon the constitutional point in the petition for

writ of certiorari, but also because the factual issue, from the standpoint of petitioner, seemed weak when compared with the cogency of the constitutional argument.

The Supreme Court's action in reversing on the factual point, thus demonstrating the correctness of appellant's argument under Point I of this brief, does not detract from the gravity of the constitutional question. We believe the constitutional question to be of the greatest consequence and one which should be re-examined by this court.

(2) In both the *Gonzales* and *Vidales* cases, this court disposed of the constitutional issue without discussion and by single sentence statements. We respectfully urge that, in the light of the grave substance of the question and because a number of cases are now before the court in which the question has been raised, this court may want to reconsider the matter in the light of the arguments now raised.¹⁵

(3) While argued under the general topic of constitutionality, appellant's argument under A, below, is in reality an argument designed, in accordance with sound judicial practice, to avoid reaching the constitutional point by so interpreting the statute as not to apply to the facts of this case.

¹⁵The fact that a different subsection of Section 401 is involved here does, of course, lend weight to the propriety of appellant arguing the constitutional point here. While some writers have urged a constitutional distinction between various subsections of 401 (see Brief, Amicus Curias, of the American Civil Liberties Union in the *Gonzales* case before the Supreme Court), we believe the issue goes deeper and touches the very power of Congress to impose loss of citizenship against the knowledge and consent of a native born citizen.

A. Section 401(c) Should Not Be Interpreted to Apply to the Facts of This Case.

The circumstances under which appellant served in the Japanese Army are that he was a dual citizen of that country and this, and was drafted pursuant to the law of Japan in which he was at the time residing. In other words, he obeyed the law of the country in which he found himself and of which he was a citizen. By virtue of the principles set forth in the cases discussed below, both by way of persuasive, if not, indeed, actually binding, precedent, and in order to avoid meeting the constitutional question, section 401(c) should not be interpreted to compel expatriation.

In *Kawakita v. United States*, 343 U.S. 717, 723, 725, the court said:

“ . . . He (Kawakita) had a dual nationality, a status long recognized in the law . . . The concept of dual citizenship recognizes that a person may have and exercise rights of nationality in two countries and be subject to the responsibilities of both. The mere fact that he asserts the rights of one citizenship does not without more mean that he renounces the other . . .

“As we have said, dual citizenship presupposes rights of citizenship in each country. It could not exist if the assertion of rights or the assumption of liabilities of one were deemed inconsistent with the maintenance of the other . . .”

Lehmann v. Acheson, 206 F. 2d 592 (C.A. 3, 1953), involved conscription into the Swiss Army of an American citizen who also had Swiss citizenship. Said the court, after setting out the quotation from *Kawakita, supra*:

“Lehmann’s actions were certainly within the periphery of the principles stated. As a Swiss citizen he was required to submit to its conscription laws and that apart from the factor that he would have been subjected to punishment had he done otherwise. We can see nothing in the record which would possibly justify a finding that Lehmann did aught but what was obligatory upon him by virtue of his dual citizenship under the laws of Switzerland . . .”
(206 F. 2d at 598.)

In *Okimura v. Acheson*, 111 F. Supp. 303, 305 (D.C. Haw., 1953), the court, again after referring to *Kawakita*, said:

“. . . Being a citizen of Japan as well as of the United States, but living in Japan, the plaintiff was subject to and under compulsion and obligation to comply with the Japanese laws. His complying with the Japanese conscription law and voting in the general elections of Japan were acts commensurate with those of Japanese citizens living in Japan. Without more, these acts cannot amount to renunciation of United States citizenship acquired by reason of birth.”

These cases demonstrate, together with the Supreme Court’s decision in *Mandoli v. Acheson*, 344 U.S. 133, that merely obeying the law of a country in which one resides, when coupled with the fact that the person has the citizenship of that country,¹⁶ does not amount to expatriation from the citizenship of the country in which

¹⁶We do not further complicate the problem by discussing what might be the situation of one who does not have dual citizenship in a foreign country in which he lives and obeying the law of that country, such as paying taxes, registering as a resident, obeying traffic laws, etc.

he is not present at the moment. To hold otherwise—to hold that dual nationality does exist, but at the same time to hold that the exercise of that dual nationality imposes loss of it—is arbitrary and unreasonable, and hence, we submit, a denial of due process under the Fifth Amendment.

We have previously called to the attention of this court the case of *Takeguma v. United States*, 156 F. 2d 437 (C.C.A. 9, 1946), wherein this court held that even a Nisei who had expatriated himself from United States citizenship under 8 U. S. C. 801(i) was not excused from the draft laws of this country. How, then, is it commensurate with due process—with our orderly concept of justice—to interpret section 401(c) so as to impose loss of citizenship in the instant case?¹⁷

If appellant's argument here is not accepted, then the constitutional issue is squarely presented, and the question is whether Congress has the power, under the Fifth and Fourteenth Amendments, to impose loss of citizenship on a native-born citizen, against his will and consent and without his knowledge of the consequences of his acts.

To this question we now turn.

¹⁷The *Takeguma* decision was rendered before this court's decisions in *Acheson v. Murakami*, 176 F. 2d 953 and *McGrath v. Abo*, 186 F. 2d 766, and did not deal with the question of the validity of the renunciation.

B. Section 401(c) Is Unconstitutional on Its Face and as Applied.

(1) PRELIMINARY STATEMENT.

The bald and undenied effect of the compulsory imposition of loss of citizenship under section 401(c) is that Congress is taking away that which the Constitution has given.

Unlike the power of Congress, pursuant to Article I, Section 8, Clause 4, to condition the grant of naturalization (*cf. Lapidés v. Clark*, 176 F. 2d 619, cert. den. 338 U.S. 860, reh. den. 338 U.S. 888), Congress has no such power, absent consent, to take away that which the Constitution grants a native-born citizen.

Appellant is a citizen of the United States, not by grace of Congress, nor by its Act. He is a citizen by virtue of the United States Constitution (Fourteenth Amendment). A constitutional right which the *Constitution* and not *Congress*, grants him, may not be taken away from him involuntarily. Article VI, Section 2 of the Constitution provides that “(t)his Constitution and the laws of the United States made in pursuance thereof . . . (are) the supreme law of the land.” It can scarcely be said that a law which takes *away* citizenship which has been *granted* by the Constitution is a law made *in pursuance* of that Constitution. On the contrary, such an act is in direct derogation thereof.

In *Dos Reis v. Nicolls*, 161 F. 2d 860 (C.C.A. 1, 1947), the court discusses the constitutional problem here involved (161 F. 2d at 862) and expresses doubt as to the validity of such legislation, but does not reach the question because it construed Section 401(c) in such a way as to avoid it. However, that court did recognize

that expatriation cannot be effected unless the act performed or condition entered into is performed voluntarily "with notice of the consequences." And that court quoted from *Mackenzie v. Hare*, 239 U.S. 299, 311, that

"a change in citizenship cannot be arbitrarily imposed, that is imposed without the concurrence of the citizen."

Holding directly that *Congress* has no authority to destroy, diminish, or dilute the *United States citizenship conferred by the Fourteenth Amendment to the Constitution of the United States*, is *United States v. Wong Kim Ark*, 169 U.S. 649. In that case the Court declared (at p. 703):

" . . . The power of naturalization, vested in Congress by the Constitution, is a power to confer citizenship, not a power to take it away." (Italics added.)

(2) THE RIGHT OF EXPATRIATION IS NOT TO BE EQUATED WITH THE PENALTY OF EXPATRIATION.

It is clear that a United States citizen may not renounce his citizenship without the consent of the Sovereign.

In *Shanks v. Dupont*, 3 Pet. (U.S.) 242, 246, this court said:

"The general doctrine is, that no persons can, by any act of their own, *without the consent of the government*, put off their allegiance and become aliens." (Italics added.)

Accord:

Murray v. The Schooner Charming Betsy, 2 Cranch. (U.S.) 64, 120.

This is consistent with what the text writers have said on the subject.

In Getty's *The Law of Citizenship in the United States* (Univ. of Chicago Press, 1934), at page 160, this explanation is made:

“ . . . The right of an individual to terminate his native allegiance without the consent of his native country has been the subject of prolonged controversy and disagreement among the states of the world. International law recognizes that each state decides for itself whether or not expatriation is permissible. At present there seems to be no agreement as to the existence of a ‘right of expatriation.’ Some states have indicated a recognition of the doctrine of voluntary expatriation under certain conditions, as specified in bilateral treaties. Other states recognize the right unconditionally, while still others do not permit the expatriation of their citizens except by special consent . . . ”

Dutcher in his article, *The Right of Expatriation*, 11 A. L. R. 447, 474, exhaustively reviews the subject and says:

“The whole body of Federal law . . . announces with greater or less distinctness that a citizen of the United States cannot absolve himself from his allegiance thereto without some law of the United States permitting him so to do. Nor does the act of 1868 change the rule.”

Swift, *A System of the Laws of the State of Connecticut* (Windham, Conn., 1795-96, Vol. I, p. 164), says:

“Natural allegiance is the perpetual obligation to government binding on all mankind. It is a duty which they owe and which they can never renounce and disclaim, *without the consent and concurrence of the supreme power of the state.*” (Italics added.)

Blackstone put it this way:

“Allegiance is the tie, or *ligamen*, which binds the subject to the King, in return for that protection which the King affords the subject . . .

“. . . (T)his natural *allegiance* . . . *cannot be divested without the concurrent act of that prince to whom it was first due.*” (Second italics added.) (I Blackstone, Commentaries, 367 *et seq.*)

Hence, it became necessary for Congress in 1868 to pass legislation giving such consent. And it did so in eloquent language. (R. S. 1999; 8 U. S. C. (1946 Ed.) 800.) But even today (8 U. S. C. 1483), Congress has withheld consent to expatriation in certain cases. (*Cf. In re Grant*, 289 Fed. 814 (D.C. S.D. Cal., 1923; *United States v. Kuwabara*, 56 F. Supp. 716 (D.C. N.D. Cal., 1944).)

One of the most recent examples of the necessity for governmental consent before a citizen can throw off the mantle of citizenship occurred also during World War II when Congress enacted 8 U. S. C. 801(i) (c. 368, Sec. 1, 58 Stat. 677) with reference to the American-born Japanese who had been evacuated from the Pacific Coast and were held in camps by the United States Government. An account of this is set out by this court in *Acheson v. Murakami*, 176 F. 2d 953, 962 (C.C.A. 9, 1949), (Finding 19).

Also demonstrating the necessity for the consent of the sovereign is *Kawakita v. United States*, 343 U.S. 717 where, in defense to a charge of treason, the defendant contended that he had exercised his “natural and inherent right” to expatriate. This contention was rejected.

If, then, a citizen cannot expatriate himself without the consent of the sovereign, the Sovereign cannot, especially because of the constitutional root of native born American citizenship, yank off the mantle from the citizen without his consent, voluntarily entered into with notice of the consequences. United States citizenship is a two-way highway, not a one-way street. Neither the Government may impose its loss nor may the citizen shed it without the consent of the other. This is not new doctrine. As seen, it was recognized as early as Blackstone's time. And see Chief Justice Parsons in *Ainslee v. Martin*, 9 Mass. 454 (1913):

"Protection and allegiance are reciprocal. The sovereign cannot refuse his protection to any subject, *nor discharge him from his allegiance against his consent*: and he will remain a subject, unless disfranchised as a punishment for some crime." (Italics added.)

It is, of course, accepted law that a person may give up, or "waive" constitutional rights. We concede that the right of citizenship granted and guaranteed by the Fourteenth Amendment would be among those constitutional rights which could be waived.¹⁸ Else, 8 U. S. C. 800 would be meaningless. But it is equally accepted law that such waivers are not to be lightly implied and that before a waiver will be decreed, there must be the exercise of a free and intelligent choice¹⁹ of at least the

¹⁸"Expatriation is the voluntary *renunciation or abandonment* of nationality and allegiance." *Perkins v. Elg*, 307 U.S. 325, 334. (Italics added.)

¹⁹Cf. the same rule even when one is *applying* for citizenship. *Moser v. United States*, 341 U.S. 41.

magnitude that is required, for example, for a waiver of the right to counsel,²⁰ or the right to a jury trial,²¹ or the right to freedom from unreasonable search and seizure,²² or the privilege against self-incrimination.²³ Were it otherwise, Congress would then be taking away *without the consent of the citizen*, a right guaranteed him by the Constitution. Congress can no more do this in regard to citizenship than it can say that a man waives the right to counsel because he voluntarily pleads guilty when he does not know of the right to counsel in the first place (*Rice v. Olsen*, 324 U.S. 786).

In other words, because Congress had the right to and did recognize the right of a citizen to give up his citizenship when he *wanted* so to do, *i.e.*, recognized the "right of expatriation," it had no power to twist that right into a liability and *impose* expatriation where the citizen did not want to give up his birthright.

(3)

CONGRESS HAS HERE EXCEEDED ITS POWER.

Similar legislation (8 U. S. C. 801(c) and (e)) to that involved here was declared unconstitutional by the United States District Court for the District of Hawaii in

²⁰*Johnson v. Zerbst*, 304 U.S. 459, 464; *Glasser v. United States*, 315 U.S. 60, 70; *Gibbs v. Burke*, 337 U.S. 773, 780; *Ureges v. Pa.*, 335 U.S. 437, 441.

²¹*Patton v. United States*, 281 U.S. 276, 312; *Hodges v. Easton*, 106 U.S. 408; *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393.

²²*Johnson v. United States*, 333 U.S. 10, 13; *Amos v. United States*, 255 U.S. 313; *United States v. Di Re*, 332 U.S. 581.

²³*Smith v. United States*, 337 U.S. 137, 150; *Quinn v. United States*, 349 U.S. 155.

Okimura v. Acheson, 99 F. Supp. 587 and *Murata v. Acheson*, 99 F. Supp. 591. Direct appeals were taken to the United States Supreme Court by the Government. That Court did not pass on the issue but remanded the cases to the District Court for specific findings as to the circumstances attending the military service and voting involved (342 U.S. 899 and 900). On remand, the court made the required findings and still held the sections unconstitutional (*Okimura v. Acheson*, 111 F. Supp. 303; *Murata v. Acheson*, 111 F. Supp. 306). That court adhered to these decisions in six later cases.²⁴ The Government pursued appeals in none of these cases. In the light of this fact, the *Okimura* and *Murata* cases take on additional stature.

In the second *Okimura* case (111 F. Supp. 303), the court pointed out that it adhered to the rationale presented in the first case (99 F. Supp. 587). In that first case the court had said (99 F. Supp. at 589, 590):

“May Congress divest a native born citizen of his birthright?

“ . . .

“The point under discussion does not involve the unquestioned power of Congress to enact naturalization laws and to condition the retention of the status of citizenship so acquired. . . .

“ . . .

²⁴*Terada v. Dulles*, 121 F. Supp. 6; *Uesu v. Dulles*, No. 1251; *Kikkawa v. Dulles*, No. 1256; *Hisamoto v. Dulles*, No. 1318; *Tamada v. Dulles*, 1263 and *Igarashi v. Dulles*, No. 1240 (the latter holding 8 801(d) also invalid).

“Too, it may be granted that a native citizen may lose that status by naturalization in a foreign country if the American national complies with the formalities with a specific, as distinguished from constructive, intention to cast off his United States citizenship.

“Our concern is, rather, where in the Constitution is to be found any grant of power—specific or reasonably implied—by which Congress is authorized to divest an American born citizen of his nationality, because, having also Japanese nationality, he served in the Japanese Army or voted in an election in Japan?

“It is the view of this Court that while the Constitution gives the Congress plenary power over citizenship by *naturalization*, it leaves the Congress no power whatsoever to interfere with American citizenship by *birth*.

“The leading case on this subject is *United States v. Wong Kim Ark*, 1898, 169 U.S. 649, 18 S. Ct. 456, 42 L. Ed. 890. While some of its teachings seem to have been occasionally forgotten or whittled down in recent years, it has never been overruled.

“ . . .

“Section 800 of Title 8, United States Code Annotated, deals eloquently with the ‘right’ of expatriation, yet Section 801, applicable alike to native and naturalized citizens, attempts to spell out some ways in which that ‘right’ may become a liability.

“Congress may not thus declare that by performing such and such an act, in or out of the United States, a citizen will become expatriated. Congress has been given control over only one means of *creating* United States citizenship, namely by naturalization. It has the power to create and to condition that

grant of citizenship; but is wholly devoid of any power to destroy citizenship by birth.²⁵

We submit that this reasoning represents the correct law. We have previously called attention to the *Wong Kim Ark* case where the Court said (169 U.S. at 703):

“The 14th Amendment, while it leaves the power of Congress where it was before, in Congress, to regulate naturalization, has conferred no authority upon Congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right of citizenship.”

Moreover, a comparison between the language of the Constitution and the statute in question immediately demonstrates the patent invalidity of 8 U. S. C. 801(c). Thus:

<i>U. S. Constitution</i>	<i>8 U. S. C. 801</i>
<i>14th Amendment.</i>	

“All persons born or naturalized in the United States . . . are citizens of the United States. . . .”	“A person who is a na- tional of the United States shall lose his nationality by:”
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Nor does the declaration of Congress in 8 U. S. C. 800 change the situation. Regardless of what may be the rule where an American citizen actually *renounces* his citizenship, there is no basis for saying that Congress has the right to deprive him of his citizenship by the

²⁵By footnote 1, p. 590, the court made this significant statement:

“This Court is aware that there have been authoritative intimations to the contrary. See *Mackenzie v. Hare*, 239 U.S. 299, 311-312, 36 S. Ct. 106, 60 L. Ed. 297; *Perkins v. Elg*, 307 U.S. 325, 329, 59 S. Ct. 884, 83 L. Ed. 1320; and *Kawakita v. United States*, 9 Cir., 1951, 190 F. 2d 506. But only in the *Mackenzie* case was the precise Constitutional question here involved squarely presented, and there under vastly different facts.”

doing of acts other than actual renunciation, simply because Congress does not like him. The Constitution gives Congress no such right; that body cannot, by a declaration, clothe itself with such power.

The attempt by Congress to say that a person as to whom the Constitution says is a citizen, is not a citizen, is no more valid than would be efforts by Congress to undo any other provision of the Constitution. A few examples, by way of rhetorical questions, will demonstrate the lack of power in Congress to so do:

1. Article I, Section 1, says that Congress shall consist of a Senate and a House of Representatives. May Congress decree that hereafter Congress shall consist of only a Senate?

2. Article I, Section 2, subsection 1, provides that members of the House of Representatives shall be chosen every second year. May Congress provide that hereafter members of the House shall be elected every third year?

3. Article I, Section 2, subsection 4, provides that where there is a vacancy in the House of Representatives from any state, the executive of that state shall fill the vacancy. May Congress provide that in such an instance the executive of that state shall not have the right but that Congress itself shall fill the vacancy?

4. Article I, Section 3, subsection 6, provides that the Senate shall have the sole power to try all impeachments. May Congress provide that the power to try impeachments shall henceforth be given to the House?

5. Article I, Section 3, subsection 7, provides that the judgment in impeachment shall extend only to removal from office and disqualification. May Congress enact that a judgment of impeachment may provide for sending the officer to jail?

6. Article I, Section 6, subsection 1, provides that a Senator or Representative for a speech or debate in either house shall not be questioned in any other place. May Congress provide that a Representative could be called to answer for a speech in the House before a Federal Grand Jury?

7. Article II, Section 1, subsection 1, provides that the President shall hold office for four years. May Congress provide that henceforth he shall only hold office for three years?

8. Article II, Section 2, Clause 1, provides, *inter alia*, that the President shall be the Commander-in-Chief of the Army and Navy, and that he shall have the power to grant pardons save in cases of impeachment. May Congress provide that he shall lose his command or his power to pardon if he engages in acts of which Congress disapproves?

9. Article III, Section 1, provides that the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may establish. May Congress provide that the Supreme Court shall no longer have judicial power if it acts in a manner displeasing to Congress?

10. Article III, Section 3, Clause 1, provides that Congress may admit new states to the Union. May Congress provide that a state once admitted into the union can be ousted therefrom?

11. Article VI, Section 3, provides that no religious test shall be required as a qualification for an office of public trust. May Congress provide that such a qualification be required?

12. The Third Amendment provides that no soldier shall, in time of peace, be quartered in any house without

the consent of the owner. May Congress provide that, in time of peace, soldiers may be quartered in a house without the owner's consent?

13. The Seventeenth Amendment provides that each state shall have two Senators. May Congress provide that a particular bad acting state shall have one or no Senators?

Further examples could, of course, be cited. The point is that citizenship is a specific right which the Constitution and not Congress gives. How, then, can Congress undo what the Constitution does?

Moreover, if Congress can strip away citizenship from persons constitutionally endowed with that status, why cannot it take away lesser rights which go to make up that bundle which we call American Citizenship, such as: the right by trial by jury, to be represented by counsel, to freedom of speech, etc. A familiar maxim is that the greater includes the lesser. Therefore, if Congress can take away the whole of citizenship, it should logically follow that it can take away any part thereof.²⁶ We believe Congress has no power in either instance. Cf. *Dawson's Lessee v. Godfrey*, 4 Cranch (U.S.) 321, 323: "(A) man can never put off his allegiance, or be deprived of the benefits of it but for a crime."

We submit that in enacting "provisions for *compulsory* expatriation"²⁷ (*italics added*) absent consent, Congress has exceeded its delegated powers.

²⁶The fact that these rights may also belong to aliens does not detract from the point. They certainly belong to citizens. See *Galvan v. Press*, 347 U.S. 522, for an example of where aliens have, if anything, less rights than citizens.

²⁷The words are those of Government in its brief (p. 49) before the Supreme Court in the *Gonzales* case.

Conclusion.

The judgment below should be reversed with instructions to enter judgment declaring appellant to be a national of the United States.

Respectfully submitted,

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APPENDIX.

Extracts From and/or Comments on Documents Lodged With the Clerk of This Court in Aid of the Court's Taking Judicial Notice of Conditions in Japan at the Time Involved in This Case.

"In 1925, the Ministry of Education issued an ordinance that, at the time, caused some dissention, but that came to be accepted as an integral part of the educational program. This ordinance provided that military officers on active duty should be appointed to give military instructions in all government and public normal, middle, higher, technical and special schools. In the next 15 years, further changes designed to sharpen the educational system into an able instrument of nationalistic policy were made. Regimentation and a hierarchal centralization of power over education were intensified in 1937 and 1941. This system continued until August, 1945." (SCAP, *Education in the New Japan*, p. 6, 16 May 1948.)

"For a long time the average citizen's reaction to the police has been one of extreme fear." (SCAP, *Summation No. 3*, Dec. 1945.)

"Free thought and free expression have been practically unknown in Japan. The police have occupied a dominant control over all phases of Japanese life. In addition to the regular police employed in maintaining law and order, Japan had an extensive network of secret police (Kempeitai) and 'thought police.' The former possessed army authority and the latter authority of the Peace Preservation Act of 1941 and similar enactment on 'thought control.' Together they had been given unlimited power to deal with any signs of unrest or dissatisfaction. Thus the emergence (end of p. 36) of demo-

cratic groups was subjected immediately to ruthless terrorization and brutality. The press and radio have served as the mouthpiece of government policy." (SCAP, *Summation No. 1*, Sept., Oct. 1946, pp. 36-37.)

"Free thought and speech were completely suppressed by the special types of Japanese police. Ruthless methods prevented the emergency of authentic democratic groups." (*Ibid.*, 33.)

"The Japanese theatre was in a condition of stagnation. Expression of new ideas was not permitted and plays were either propagandistic or escapist in nature. Troupes touring the Country presented nothing but obviously official materials." (*Ibid.*, 148.)

"In the course of 20 years, Japanese militarists had constructed effective machinery for controlling the speech, thoughts, and movements of the people. This was accomplished through legislation, the police, censorship regulations, centralized control over newsprint and ownership of radio broadcasting facilities." (*Ibid.*, 163.)

"In the later years, preceding and during the war, the most vicious regimentation of the people came through the police force of Japan, which was also under the Home Ministry. By both legal and extra-legal methods the police eliminated dissident elements, frequently throwing people in jail who were considered troublesome and keeping them there for years without lodging specific charges." (SCAP, *Two Years of Occupation*, p. 14.)

"Most objectionable of these were, of course, the supervision and restriction of the people in the exercise of their fundamental rights under the so-called Peace Preservation Law. For this purpose there were 'Thought Police' or 'Special Higher Police' units in the municipalities, pre-

fectures and in the Home Ministry. The activities of these bodies were supplemented by the 'Protection and Surveillance Commission' and 'Protection and Surveillance Stations' in the procuratorial system under the Ministry of Justice." (SCAP, *A Brief Progress Report on the Political Reorientation of Japan*, p. 7.)

"The great masses of the people, docile by training and terrorized by fear, were without a voice in the determination of their own affairs." (SCAP, *Two Years of Occupation*, pp. 13-15.)

"(Nisei, whether in Japan or long or short time) were under surveillance (by the police) by reason of their identity and association." (Togosaki Deposition, p. 10.)

"Conscription or government notification is final to which no one can appeal. There is no process, no media, no channel by which an appeal can be made." (*Ibid.*, pp. 26-27.)

"There was fear . . . among (the draftees) that . . . they would be shot or killed . . . if they didn't obey summons." (*Ibid.*, p. 27.)

This court commented on several features from the Murayama deposition in *Fukumoto v. Dulles* 216 F. 2d at 555.

After the Manchurian incident, no one refused military conscription. (Matsuki Deposition, pp. 15, 17.) One couldn't refuse conscription. (*Ibid.*, pp. 18, 21.)

No. 14,753

IN THE

United States Court of Appeals
For the Ninth Circuit

LAU AH YEW,

Appellant,

VS.

JOHN FOSTER DULLES, Secretary of
State of the United States of
America,

Appellee.

On Appeal from the District Court of the United States
for the District of Hawaii.

BRIEF FOR APPELLEE.

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No. 14,753

IN THE

**United States Court of Appeals
For the Ninth Circuit**

LAU AH YEW,

Appellant,

vs.

JOHN FOSTER DULLES, Secretary of
State of the United States of
America,

Appellee.

**On Appeal from the District Court of the United States
for the District of Hawaii.**

BRIEF FOR APPELLEE.

**STATEMENT OF PLEADINGS AND FACTS
DISCLOSING JURISDICTION.**

This is an appeal from the District Court's order striking the complaint and dismissing the action on the ground that the complaint is sham and false (R. 20, 21).

The action is under 8 U.S.C., Section 903 for declaration pursuant to that section that plaintiff-appellant was a national of the United States (R. 3-8).

The District Court had jurisdiction under 8 U.S.C., Section 903. The order to strike and to dismiss was

filed on February 8, 1955 (R. 21). Notice of appeal was filed on April 7, 1955 (R. 22). This Court had jurisdiction to review the order to strike and to dismiss under 28 U.S.C., Sections 1291 and 1294 (1).

STATEMENT OF PLEADINGS.

On April 26, 1954, the Second Amended Complaint was filed (R. 8). On May 7, 1954, a motion to dismiss the second amended complaint was filed. On May 26, 1954, an order overruling motion to dismiss was filed. On May 25, 1954, interrogatories were served on appellant's attorney (R. 14). At some date after June 3, 1954, answers to interrogatories were filed with the United States District Court for the District of Hawaii (R. 16) but were not served on appellee until January 26, 1955 (Appellant's Brief, p. 7). The motion for application for entry of default was filed on January 13, 1955, and was denied on January 26, 1955, judgment being ordered to be entered forthwith by the Court, although at a later date a written order denying application for entry of default judgment was filed (R. 20). On the date that the default judgment was denied (January 26, 1955), the appellee was given ten days in which to answer. Within that ten days, and on January 31, 1955, the motion to strike was filed and scheduled for hearing within ten days (R. 1 and 17).

The motion to strike was granted (R. 21 and 24-28). From the order to strike and to dismiss, and the order denying application for entry of default, appellant

filed a notice of appeal and points to be relied upon on appeal (R. 22, 31).

The questions as to the propriety of the motion to strike and to dismiss was raised by appellant's opposition to the motion to strike.

The question as to whether a default should have been entered by the District Court is raised by appellee's opposition to the application for entry of default and the subsequent order of the Court denying the application for entry of default (R. 17, 18, 19, 20).

STATUTES INVOLVED.

The only statute involved is Section 503 of the Nationality Act of 1940, 8 U.S.C., Section 903, 54 Stat. 1171, found in appellant's brief.

STATEMENT OF FACTS.

The pertinent facts involved in this case are taken from the second amended complaint (R. 3-8). Appellant claims he is a citizen of the United States of America, having been born in Honolulu on February 1, 1898 (R. 3), that he claims permanent residence in the United States and Hawaii on the basis that for a period of thirty-two years he resided continuously in the Territory of Hawaii (R. 6); that in June of 1952 the appellant personally applied to the American Consulate General at Hong Kong for a United States passport (R. 5); that pursuant to appellant's appli-

cation for a United States passport he was interviewed by the Vice Consul in charge of processing applications for United States passports (R. 5); that at this interview appellant produced certain documents shown in appellant's Exhibits "A", "B", "C", "D", "E", "F", "G", attached to his affirmation made on February 6, 1954; and that he testified to his birth in Hawaii (R. 5); that at the conclusion of said interview said Vice Consul returned to the appellant all the above described documentary evidence tending to prove his United States citizenship and denied his application for a United States passport upon the ground that he was not a national of the United States (R. 6); and the refusal of the appellee by and through his official executive to issue to appellant said United States passport is the denial of a right or privilege of a United States citizen on the ground that he is not a national of the United States.

The interrogatories by appellee of the appellant revealed the following:

"Q.(3) Describe the manner in which you made the application for a United States passport at the American Consulate in Hong Kong in June, 1952.

A.(3) Firstly, by written letter to the Consulate General in May, 1952. On receiving no reply, I called in June, 1952, on one occasion and interviewed the persons described in Reply No. 2. (Reply No. 2 is the description of the Vice Consul who interviewed appellant.)

Q.(4) List and describe all the documents and any other evidence of American citizenship presented by

you at the time you reportedly applied for a United States passport at the American Consulate in Hong Kong in June, 1952.

A.(4) I produced:

(a) Identification Card of the U. S. Army dated 16th February, 1943, issued in Honolulu.

(b) Government Identity Card with a set of finger prints dated 4th January, 1942, issued in Honolulu.

(c) Hawaii Defense Volunteer Discharge paper in the name of "Yee Yew Lau" dated 5th July, 1945.

(d) Tax release dated 19th May, 1947—issued in Honolulu.

(e) Letter from the Honolulu Immigration Office certifying that that office refused to give me back my birth and citizenship certificate and a certificate or letter by one Yee Tim of my birth in Honolulu.

Q.(5) Did you at that time present an identifying witness who was a United States citizen?

A.(5) No.

Q.(6) Did you ever at any time present at the American Consulate in Hong Kong an identifying witness who was an American citizen?

A.(6) No.

Q.(7) Have you ever presented to the American Consulate in Hong Kong a birth certificate?

A.(7) No.

Q.(8) At the interview with the American Vice Consul in Hong Kong in June, 1952, did the Vice Consul tell you you had not presented sufficient evidence to establish your identity?

A.(8) Yes.

Q.(9) At the interview with the American Vice Consul in Hong Kong in June, 1952, did the Vice Consul tell you you had not presented sufficient evidence to establish the fact that you were born in the United States?

A.(9) Yes.

Q.(10) Did the Vice Consul tell you that he was not satisfied that you were an American citizen?

A.(10) Yes.

Q.(11) Did the Vice Consul advise you as to what further type of evidence you should submit in order to establish your American citizenship?

A.(11) No, but he asked me for other evidence, and I said that I had produced all the evidence available. I cannot remember the questions which he asked me.

Q.(12) Did the Vice Consul tell you that he was satisfied that you were not an American citizen?

A.(12) He said 'I believe you are not an American citizen' or words to that effect."

From the above questions and answers it is clear that although the appellant alleges in his complaint that he applied for a passport, that actually he did no such thing. Secondly, that if there were any type of informal application for a passport, that there was no denial of this passport or application, whatever it may have been. The Court ruled in this case that appellant had not complied with Rule 11; that the actual facts as they appear in appellant's answers to appellee's interrogatories do not fit together at all to the allegations contained in the second amended complaint, and that consequently the second amended com-

plaint was sham and false and should be stricken. In particular, those allegations which allege that a passport was applied for and denied are sham and false in view of the answers to the interrogatories of the appellee.

QUESTIONS PRESENTED.

1. Did the Court err in failing to enter a default judgment against the Secretary of State upon his failure to file an answer within the required time?
 2. Did the Court err in striking the complaint and dismissing the action?
-

ARGUMENT.

I

DENIAL OF THE APPLICATION FOR JUDGMENT BY DEFAULT.

The granting or denial of an application for a default judgment lies within the sound discretion of the trial Court. (*Missouri Ex Rel. De Vault v. The Fidelity & Casualty Co.*, 8 Cir. 1939, 107 F.2d 343; *Latini v. R. M. Dubin Corporation*, (N.D. Ill. 1950), 90 F. Supp. 212.) Since this matter is within the sound discretion of the trial Court, its decision may only be overturned if there is an abuse of that discretion. *National Ben. Life Ins. Co. v. Shaw-Walker*, 111 F.2d 497, cert. den. 311 U.S. 673; *Delno v. Market St. Ry. Co.*, 124 F.2d 965; *Federal Trade Comm. v. Tomsen-King & Co.*, 109 F.2d 516.

Some of the facts which the Court may consider in exercising its discretion are whether the appellant will be prejudiced and, if so, the extent thereof; whether the entry of the default judgment would result in injustice. *Ciccarello v. Joseph Schlitz Brewing Co.*, (S.D.W.Va., 1941), 1 F.R.D. 491; *Protective Union Inc., v. Great Atlantic & Pacific Tea Co.*, (E.D. Ark., 1949) 83 F. Supp. 646; *Interstate Commerce Commission v. Smith* (E.D. Pa.) 82 F. Supp. 39. A good discussion concerning the Court's discretion is found in *Henry v. Metropolitan Life Insurance Co.*, (W.D. Va., 1942) 3 F.R.D. 142-144.

The question in reality then becomes one of whether the trial Court has indeed abused its discretion. We think not. As a matter of fact, the trial Court did exercise sound discretion. As has been stated by trial Courts and by Courts of Appeal, citizenship is a precious thing and it is neither granted nor denied without proper adjudication. *Wong Wing Foo v. McGrath*, 9 Cir., 196 F.2d 120, 122; *Lee Hong v. Acheson*, 110 F. Supp. 60.

As will be noted by an examination of the docket entries herein, on January 10, 1955, a motion to take an oral deposition of the plaintiff was filed. On January 13, 1955, this motion was withdrawn, and the application for the entry of judgment by default was filed.

Apparently, the appellant discovered that the appellee had not filed an answer in this proceeding and was in a hurry to take the best advantage possible of the situation as it then stood. There was, as will be

noted, no entry of default by the clerk in this matter, pursuant to Rule 55(a), Federal Rules of Civil Procedure. If the oral deposition had been taken, appellant would have been in a much better position to proceed with a *prima facie* case under Rule 55(e), Federal Rules of Civil Procedure.

Appellant states that the substantial rights of the appellee would not have been affected for, under Rule 55(e), he must present evidence satisfactory to the Court concerning defaults against the United States. This statement of course could not be more clearly wrong. In an adjudication of citizenship the Court, because of the nature of citizenship, should have before it both sides of the problem. Appellant states that having one side present evidence is not prejudicing the substantive rights of the appellee. This statement, we contend, is absolutely erroneous.

Appellant's contention that the Court's ground for denying the motion for default is that default judgments with respect to citizenship were not favored by the Court is erroneous.

As has been stated in appellant's brief, *Klapprott v. U. S.*, 335 U.S. 601, left this question undecided. However, it will be noted that in the *Klapprott* case, the proceedings were returned to the District Court with instructions to exercise its sound discretion concerning whether a default judgment should be set aside.

Appellant states merely that the granting of the application for default, or that the holding in abey-

ance of the application for default would do nothing more than give the appellant time to apply for and receive travel documents from the United States Consul in Hong Kong to come to the United States and prosecute his claim. It is a well known fact that many cases of this nature have been disposed of on the merits by use of depositions of plaintiffs who were unable to get travel documents from the Department of State. *Wong Doo Ning v. Dulles*, D.C., DC (unreported); *Leung Yin-Jue by his friend Leung Hing v. Dulles*, Civil No. 1446-SD, S.C. Cal. (unreported).

Indeed, counsel for appellant is well aware of this method of disposing of citizenship cases on their merits. *Fong Ah Kwai v. Dulles*, Civil No. 1182 (US DC-Hawaii), a case in which counsel for appellant was and still is counsel for the plaintiff herein and is scheduled for trial upon oral depositions of the plaintiff.

It is the contention of the appellee that the Court properly denied the application for a judgment by default in that because of the nature of citizenship the Courts of this country should be loathe to declare it without a full adjudication on the merits; that the appellant was not ready to proceed with presenting his *prima facie* case, and that he well knew that he could have been ready for it by presenting oral depositions of the appellant if he was unable to secure a Certificate of Identity from the Department of State. Third, that as an added circumstance, the fact that the appellant himself was negligent in serving appellee with answers to the interrogatories requested, within the

time allotted by Rule 33 of Federal Rules of Civil Procedure or even within a reasonable time, although not determinative in itself, should and probably did bear some weight with the District Court's decision.

II

THE GRANTING OF THE MOTION TO STRIKE AND THE DISMISSAL OF THE ACTION ARE PROPER.

The Court will note that this motion to strike is filed under Rule 11 of Federal Rules of Civil Procedure in that the appellee contends that the second amended complaint filed herein is sham and false.

This is a proceeding under the Nationality Act of 1940, 8 USCA, 903, which reads in part as follows:

“If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the District Court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States . . . ”

The pertinent portions of the second amended complaint, which will be discussed and which are vital to the appellant's action, are as follows:

“ . . . the plaintiff, in June 1952, personally applied at the American Consulate General at Hong-kong for a United States passport; . . . that, pursuant to plaintiff's application for a United States passport, he was interviewed by the Vice Consul in charge of the processing of applications for United States passports; . . . that, at the conclusion of said interview, said Vice Consul, as the executive officer in charge of the processing of applications for United States passports, returned to the plaintiff all the above described documentary evidence tending to prove his United States citizenship and denied his application for a United States passport to enter the United States upon the ground that he was not a national of the United States; that it was the opinion of the Vice Consul that the proof offered and presented to him was insufficient to establish plaintiff's United States citizenship; . . . and, the refusal of the defendant by and through his official executive, to-wit: The American Consulate General in Hong-kong, to issue to him said United States passport is the denial of a right or privilege of a United States citizen on the ground that he is not a national of the United States.”

It may appear from the above quoted portions of Paragraph III that the appellant has used all the words necessary to bring his action within the scope of Section 503 of the Nationality Act of 1940. However, it would be well to examine these allegations in the light of the interrogatories and answers to interrogatories. It is the contention of the appellee that no application for a United States passport was made in June, 1952. In support of this contention appellee sub-

mits questions 3, 4, 5, 6 and 7, and the answers thereto, of the interrogatories:

“Q. 3 Describe the manner in which you made application for a United States passport at the American Consulate in Hong Kong in June, 1952.

A. 3 Firstly by written letter to the Consulate General in May 1952. On receiving no reply I called in June 1952 on one occasion and interviewed the persons described in Reply No. 2.

Q. 4 List and describe all the documents and any other evidence of American citizenship presented by you at the time you reportedly applied for a United States passport at the American Consulate in Hong Kong in June 1952.

A. 4 I produced:

(a) Identification Card of the U.S. Army dated 16th February 1943 issued in Honolulu.

(b) Government Identity Card with a set of finger prints dated 4th January 1942 issued in Honolulu.

(c) Hawaii Defense Volunteer Discharge Paper in the name “Yee Yew Lau” dated 5th July 1945.

(d) Tax Release dated 19th May 1947—is issued in Honolulu.

(e) Letter from the Honolulu Immigration Office certifying that that Office refused to give me back my birth and citizenship certificate and a certificate or letter by one Yee Tim of my birth in Honolulu.

Q. 5 Did you at that time present an identifying witness who was a United States citizen?

A. 5 No.

Q. 6 Did you ever at any other time present at the American Consulate in Hong Kong an identifying witness who was an American citizen?

A. 6 No.

Q. 7 Have you ever presented to the American Consulate in Hong Kong a birth certificate?

A. 7 No."

From these questions and answers it is clear, first, that no formal application for a passport was made by the appellant in June, 1952. He states that he made application for a United States passport by written letter to the Consulate General in May, 1952, and, by calling in June, 1952, on one occasion and being interviewed by a United States Vice Consul, and by at that time producing the documents enumerated in the answer to question No. 4.

Title 22, Code of Federal Regulations, Section 51.14 provides:

"Before a passport is issued to any person by or under the authority of the United States such person shall subscribe to and submit a written application duly verified by his oath before a person authorized and empowered to administer oaths. . . ."

The appellant herein obviously did not, in June, 1952, submit a written application, as provided in the Code of Federal Regulations, upon which a Consul General could act in granting or denying a passport application.

There was no denial of any sort made in June, 1952. What was done was that upon the first interview of the appellant the United States consular official asked for more evidence concerning the appellant's claim to citizenship and his right to be issued a United

States passport. In support of this contention, questions 8, 10, 11 and 12, and the answers thereto are as follows:

"Q. 8 At the interview with the American Vice Consul in Hong Kong in June 1952 did the Vice Consul tell you you had not presented sufficient evidence to establish your identity?

A. 8 Yes.

Q. 10 Did the Vice Consul tell you that he was not satisfied that you were an American citizen?

A. 10 Yes.

Q. 11 Did the Vice Consul advise you as to what further type of evidence you should submit in order to establish your American citizenship?

A. 11 No, but he asked me for other evidence and I said that I had produced all the evidence available. I cannot remember the questions which he asked me.

Q. 12 Did the Vice Consul tell you that he was satisfied that you were not an American citizen?

A. 12 He said 'I believe you are not an American citizen' or words to that effect."

It will be noted that appellant has answered that the Vice Consul, in June, 1952, told him that he had not presented sufficient evidence to establish his identity. Secondly, that the Vice Consul told him that he was not satisfied that he was an American citizen and he admits that the Vice Consul had asked for some other evidence, although he cannot at this time state what questions or what evidence the Vice Consul asked for. Thirdly, the appellant alleges that the Vice Consul stated to him: "'I believe you are not an American citizen' or words to that effect," so that

the only statement which the appellant made was that the Vice Consul believed that upon the conclusion of the interview that he, the appellant, was not a citizen.

Again it would be well to refer to Title 22 of the Code of Federal Regulations, Section 51.14, which requires that a formal application be filed before a passport be issued. Title 22, Code of Federal Regulations, Section 51.23 sets out in detail the documents and witnesses and other evidence which is necessary for an applicant to present to be issued a passport. It is noted under Paragraph (r):

“When the applicant applies for a passport he should be accompanied by one credible witness who is an American citizen, has known the applicant for a period of 2 or more years, and has a definite place of residence.”

Answers to interrogatories 5 and 6 reveal that appellant never has presented an identifying witness.

Title 22, Code of Federal Regulations, Section 51.51 relates to evidence of citizenship to accompany application for a passport. This section relates directly to the above contention that there was no denial made and no compliance with basic requirements. It provides that a birth certificate, or several other possibilities to prove birth, accompany an application for a passport. These are: 1. Birth certificate; 2. Baptismal certificate; 3. Affidavit of a parent or physician, nurse or midwife who attended the birth; or, 4. An affidavit of a reputable person with sufficient knowledge to testify as to place and date of applicant's birth.

It is interesting to note that not *one* of the above requirements was met by petitioner. Reference is made to question 4 and the answer contained therein, and particularly to answer 4(e) in which appellant states "the Honolulu Immigration Office refused to give me back my birth . . . certificate."

If in reality appellant does have and is entitled to a Bureau of Vital Statistics certificate of birth or a certificate of Hawaiian birth issued by the Secretary of Hawaii, he could, without much difficulty, secure copies of either by which his problems would be well on the way to solution.

Appellant has alleged that he personally applied at the American Consulate General in Hong Kong for a United States passport; that he was interviewed, presumably on the same day; and that his passport was denied on the ground that he was not a national of the United States.

The first allegation, that he applied for a passport, is not substantiated by appellant's own answers to interrogatories. The second allegation, that the passport application was then and there denied by the Vice Consul of the United States, also is not substantiated by appellant's answers to interrogatories in which he states: 1. That appellant has not presented a birth certificate; 2. that appellant has not presented an identifying witness; 3. that the Vice Consul informed him that he had not presented sufficient evidence to establish his identity; 4. that the Vice Consul advised him that he should submit other evidence, and 5. that the Vice Consul stated that he

believed that appellant was not a United States citizen. This is the strongest answer which the appellant could truthfully give concerning the question of the denial of his "application for a passport in June, 1952."

Appellant could not have been issued a passport until he had executed the formal written application for one, which he apparently did some seven months later on January 11, 1953. In view of these answers to the interrogatories which do not substantiate the allegations of the second amended complaint this second amended complaint now falls within the purview of *Lung v. United States*, 212 F.2d 73.

Further, this case is distinguishable from *Young Jin Teung v. Dulles*, (2 Cir. 1956) 229 F.2d 244; *Chin Chuck Ming v. Dulles*, (9 Cir. 1955), 225 F.2d 849; *Wong Ark Kit v. Dulles*, (DC D.Mass. 1955), 127 F. Supp. 871; *Ow Yeong Yung v. Dulles*, (DC N.D. Cal. 1953), 166 F. Supp. 766, which held that an unreasonable delay or unreasonable requests for evidence in processing an application for a passport could constitute a denial under certain circumstances. Here, the appellant is claiming that on the very day that he appeared for an interview without filing an application for a passport, his passport was denied. Nor do we believe that this particular situation is one which would normally fall within those contemplated in *Wong Wing Foo v. McGrath*, 196 F.2d 120, for it is apparent that in that case what was contemplated was a situation where the administrative officer refused to allow the applicant (the appellant in this case) to

apply for a passport or to apply for a right; and consequently he would have, therefore, no administrative remedies to pursue. He would be cut off before he had a chance to have any administrative action. This is not the case here. The case here is more as characterized by the trial Court, that is, of a person who is seeking information and advice concerning an application for a right or privilege which he may make at some future date and which in this case he did make in January of 1953.

CONCLUSION.

It is submitted that the application for judgment by default was properly denied and that the motion to strike under Rule 11 was properly granted. The judgment should be affirmed.

Dated, Honolulu, T.H.

May 23, 1956.

LOUIS B. BLISSARD,

United States Attorney,

District of Hawaii,

CHARLES B. DWIGHT III,

Assistant United States Attorney,

District of Hawaii,

LLOYD H. BURKE,

United States Attorney,

Northern District of California,

Attorneys for Appellee.

No. 14753

**United States
Court of Appeals**
for the Ninth Circuit

*See Also
No. 15768 Vol. 3053*

LAU AH YEW,

Appellant,

vs.

JOHN FOSTER DULLES, Secretary of State of
the United States of America,

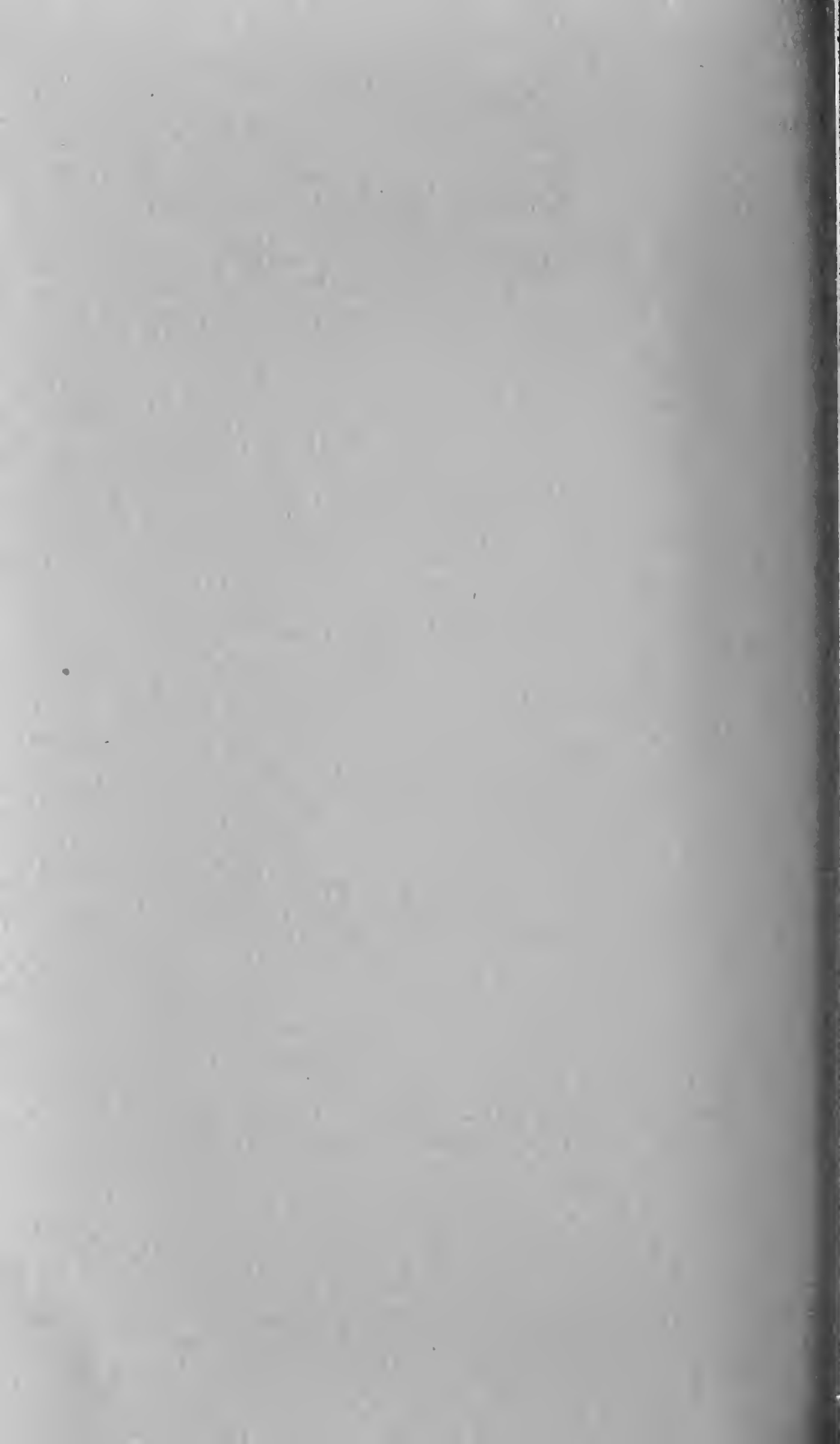
Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Hawaii.

FILED

JUL 20 1955



No. 14753

**United States
Court of Appeals**
for the Ninth Circuit

LAU AH YEW,

Appellant,

vs.

JOHN FOSTER DULLES, Secretary of State of
the United States of America,

Appellee.

Transcript of Record

**Appeal from the United States District Court
for the District of Hawaii.**

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For the Appellant, Lau Ah Yew:

W. Y. CHAR, ESQ.,
Room 311, Liberty Bank Buliding,
Honolulu, T. H.

For the Appellee, John Foster Dulles, Etc.:

LOUIS B. BLISSARD, ESQ.,
United States Attorney;
CHARLES B. DWIGHT III,
Asst. U. S. Atty.,
Federal Building,
Honolulu, T. H.

In the United States District Court in and for the
District of the Territory of Hawaii

Civil No. 1254

LAU AH YEW,

Plaintiff,

vs.

JOHN FOSTER DULLES, Secretary of State of
the United States of America,

Defendant.

COMPLAINT UNDER SECTION 503 UNITED
STATES NATIONALITY ACT

SECOND AMENDED COMPLAINT

I.

That the Plaintiff is a citizen of the United States of America, having been born in Honolulu, Territory of Hawaii; that he claims his United States citizenship by reason of the fact that he was born on American soil; that he had resided in said Honolulu for a period in excess of 30 years; that he served as a member of the Hawaii Defense Volunteers from July 5, 1942, to July 4, 1945.

II.

That the defendant, John Foster Dulles, is the Secretary of State of the United States of America, with central offices located in Washington, D. C.

III.

That plaintiff was born in Honolulu, Territory of Hawaii, on February 1, 1898; that he left Honolulu

with his father, Lau Sing, for China when he was about 8 months old; that he returned to Honolulu in 1915, at which time he produced 3 witnesses who testified before the Immigration authorities that he was born in said Honolulu; that, after said hearing and testimony, the Immigration authorities admitted him as a native-born citizen of the United States; that from 1915-1922, plaintiff resided continuously in the United States; that, in 1922, before plaintiff departed on his 2nd visit to China, the Immigration authorities in San Francisco issued to him Form 430, a [3*] certificate certifying that he was a citizen of the United States; that he returned to San Francisco from China in 1923 and the Immigration authorities at said port of entry readmitted him as a United States citizen; that, shortly thereafter, he returned to Honolulu where he was issued a Certificate of Identity certifying that he was a citizen of the United States by the Immigration authorities in Honolulu; that, from 1923-1947, he resided continuously in Honolulu aforesaid; and that, prior to plaintiff's departure from Honolulu for Hong Kong, on July 4, 1947, he deposited his said Certificate of Identity with the Immigration authorities at Honolulu.

That, in June, 1952, plaintiff, asserting his United States citizenship by virtue of birth in the Territory of Hawaii, claimed that, as such United States citizen, he was entitled to have issued to him a United States passport by the American Consulate

*Page numbering appearing at foot of page of original Certified Transcript of Record.

General in Hong Kong, defendant's official agency charged with the duty of issuing United States passports to persons claiming United States citizenship; that the issuance of United States passports by the defendant's agency was a right or privilege enjoyed exclusively by United States citizens; that, pursuant to said claim, the plaintiff, in June, 1952, personally applied at the American Consulate General at Hong Kong for a United States passport; that the presentation of a valid United States passport issued by the United States Consulate General at Hong Kong was an absolute and indispensable prerequisite to the purchase of passage from any transportation company in Hong Kong to travel to the United States; that, pursuant to plaintiff's application for a United States passport, he was interviewed by the Vice Consul in charge of the processing of applications for United States passports; that at this interview with the Vice Consul at the American Consulate General's office in Hong Kong, in June, 1952, in order to prove his United States citizenship, plaintiff produced certain documents, such as his Honorable Discharge Certificate issued by the Hawaii Defense [4] Volunteer of the Territory of Hawaii certifying to his service from July, 1942, to July, 1945, his draft board certificate and other documents as shown in plaintiff's Exhibits A, B, C, D, E, F, and G attached to his Affirmation made on February 6, 1954, on file herein and made a part hereof; that he testified to his birth in Hawaii and to the fact that, except for one year's

absence in China, he had resided continuously in Honolulu, Territory of Hawaii, for a period of 32 years, to wit: from 1915 to 1947; that, at the conclusion of said interview, said Vice Consul, as the executive officer of the defendant, in the performance of his duties as officer in charge of the processing of applications for United States passports, returned to the plaintiff all the above-described documentary evidence tending to prove his United States citizenship and denied his application for a United States passport to enter the United States upon the ground that he was not a national of the United States; that it was the opinion of the Vice Consul that the proof offered and presented to him was insufficient to establish plaintiff's United States citizenship; that, by reason of said Vice Consul's refusal to issue to plaintiff a United States passport, he, plaintiff, against his will was forced to continue to reside in a foreign country; that plaintiff, a person claiming United States citizenship by virtue of birth in the United States, has the right or privilege of entering and residing in the United States; that the American Consulate General's refusal to issue to plaintiff said passport is the restraint of a fundamental right of a United States citizen to enter and reside in his own country; that such a restraint is a violation of personal liberty, freedom of movement and a denial of a right or privilege guaranteed to him by the United States Constitution, and the refusal of the defendant by [5] and through his official executive, to wit:

the American Consulate General in Hong Kong, to issue to him said United States passport is the denial of a right or privilege of a United States citizen on the ground that he is not a national of the United States.

IV.

That the said Lau Ah Yew was married in the City and County of Honolulu, Territory of Hawaii; that, from this marriage, there are four children, to wit: William, Richard, Goldie, and Lita, all United States citizens; that the two sons, William Yee Kam Lau and Richard Yee Wing Lau, are veterans of the Army of the United States.

V.

That plaintiff claims that he is a United States citizen by virtue of his birth in the Territory of Hawaii; that he is entitled to establish and to have this Court declare his United States nationality under Section 503, United States Nationality Act; that, as a citizen and national of the United States of America, he is entitled to a United States passport to enable him to enter and reside in the United States.

Wherefore, plaintiff prays for judgment and decree, adjudging that he is a citizen and/or national of the United States of America and, as such, is entitled to the rights and/or privileges of a national of the United States of America, and a United States passport forthwith in order to return to the United States of America.

Dated: Honolulu, T. H., this 24th day of April, 1954.

/s/ W. Y. CHAR.

Receipt of copy acknowledged.

[Endorsed]: Filed April 26, 1954. [6]

In the United States District Court for the
District of Hawaii
Civil No. 1254

LAU AH YEW,

Plaintiff,

vs.

JOHN FOSTER DULLES, Secretary of State of
the United States of America,
Defendant.

**MOTION TO DISMISS SECOND AMENDED
COMPLAINT**

Comes now A. William Barlow, United States Attorney for the District of Hawaii, and moves that the Second Amended Complaint herein be dismissed upon the following grounds:

1. It affirmatively appears upon the face of the complaint that the plaintiff has failed to state a claim or cause of action against the defendant upon which relief can be granted.

2. It affirmatively appears upon the face of the complaint that this Honorable Court lacks jurisdiction over the subject matter of the complaint filed herein.

Dated: Honolulu, T. H., this 7th day of May, 1954.

A. WILLIAM BARLOW,
United States Attorney,
District of Hawaii;

By /s/ LOUIS B. BLISSARD,
Asst. United States Attorney,
District of Hawaii. [8]

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS

To: W. Y. Char, Room 311, Liberty Bank Building,
Honolulu, T. H., Attorney for Plaintiff.

You are hereby notified that the foregoing Motion to Dismiss Second Amended Complaint will be heard before the Honorable J. Frank McLaughlin, Judge of the United States District Court for the District of Hawaii, in his courtroom in the Federal Building, Honolulu, T. H., on Friday, May 21, 1954, at 10:00 a.m., or as soon thereafter as counsel may be heard.

Dated: Honolulu, T. H., this 7th day of May, 1954.

A. WILLIAM BARLOW,
United States Attorney,
District of Hawaii;

By /s/ LOUIS B. BLISSARD,
Asst. United States Attorney.

[Endorsed]: Filed May 7, 1954. [12]

[Title of District Court and Cause.]

ORDER OVERRULING MOTION TO DISMISS

On the 21st day of May, 1954, this cause coming on to be heard upon the motion of the Defendant to dismiss the second amended complaint and the court, having heard the parties by their respective counsel and being fully advised, denies the motion to dismiss upon the grounds that the complaint does state a claim or cause of action against the defendant upon which relief can be granted and that this court has jurisdiction over the subject matter of the second amended complaint filed herein.

It is Therefore Ordered, that the motion to dismiss the second complaint be, and it is hereby, denied.

Dated: Honolulu, T. H., this 25th day of May, 1954.

/s/ J. FRANK McLAUGHLIN,
Judge, United States
District Court.

Approved as to Form:

/s/ LOUIS B. BLISSARD,
Asst. United States Attorney.

[Endorsed]: Filed May 26, 1954. [14]

[Title of District Court and Cause.]

MOTION TO STRIKE

Defendant, John Foster Dulles, Secretary of State of the United States of America, moves the Court to strike Plaintiff's Second Amended Complaint filed herein on April 26, 1954, as sham and false and for such further relief as may be appropriate.

This motion is brought under Rule 11 of the Federal Rules of Civil Procedure and is based upon the record heretofore made and upon the interrogatories by Defendant, and Plaintiff's answers to interrogatories by Defendant which are attached hereto and made a part hereof, and upon the State Department file which, at the present time is in evidence before this Court.

Dated: Honolulu, T. H., this 28th day of January, 1955.

LOUIS B. BLISSARD,
United States Attorney, District of Hawaii, Attorney for Defendant;

By /s/ CHARLES B. DWIGHT, III.,
Asst. United States Attorney,
District of Hawaii. [16]

[Title of District Court and Cause.]

INTERROGATORIES BY DEFENDANT

Sir:

Please take notice that the defendant herein requires the plaintiff, Lau Ah Yew, to answer the following interrogatories under oath within fifteen days from the date of service herein pursuant to Rule 33 of the Federal Rules of Civil Procedure:

1. State the name of the American Vice Consul in Hong Kong who interviewed you in June, 1952, when you reportedly applied for a United States passport.

2. If you do not know the name of the American Vice Consul who interviewed you in June, 1952, describe his physical appearance in detail.

3. Describe the manner in which you made the application for a United States passport at the American Consulate in Hong Kong in June, 1952.

4. List and describe all the documents and any other evidence of American citizenship presented by you at the time you reportedly applied for a United States passport at the American Consulate in Hong Kong in June, 1952.

5. Did you at that time present an identifying witness who was a United States citizen?

6. Did you ever at any other time present at the American Consulate in Hong Kong an identifying witness who was an American citizen? [18]

7. Have you ever presented to the American Consulate in Hong Kong a birth certificate?

8. At the interview with the American Vice Consul in Hong Kong in June, 1952, did the Vice Consul tell you you had not presented sufficient evidence to establish your identity?

9. At the interview with the American Vice Consul in Hong Kong in June, 1952, did the Vice Consul tell you you had not presented sufficient evidence to establish the fact that you were born in the United States?

10. Did the Vice Consul tell you that he was not satisfied that you were an American citizen?

11. Did the Vice Consul advise you as to what further type of evidence you should submit in order to establish your American citizenship?

12. Did the Vice Consul tell you that he was satisfied that you were not an American citizen?

13. Have you applied to the American Consulate in Hong Kong for a Certificate of Identity to enable you to come to Hawaii to prosecute your declaratory judgment action in the United States District Court?

14. If so, when?

15. Have you ever been denied by anyone at the American Consulate in Hong Kong a Certificate of Identity for the purpose of enabling you to come to Hawaii to prosecute your declaratory judgment suit in the United States District Court?

16. If so, when?

17. If you have been denied a Certificate of Identity, have you appealed such denial to the Secretary of State? [19]

18. If so, when?

Dated: Honolulu, T. H., this 25th day of May, 1954.

A. WILLIAM BARLOW,
United States Attorney, District of Hawaii, Attor-
ney for Defendant;

By /s/ LOUIS B. BLISSARD,
Asst. United States Attorney,
District of Hawaii.

To: W. Y. Char, Room 311, Liberty Bank Building,
Honolulu, T. H., Attorney for Plaintiff. [20]

[Title of District Court and Cause.]

PLAINTIFF'S ANSWERS TO INTERROGA-
TORIES MADE BY DEFENDANT ON 25th
DAY OF MAY, 1954

The Plaintiff answers the said Interrogatories according to the Numbers thereof as follows:

1. I do not know.
2. The Vice Consul who interviewed me in June, 1952, was a man who spoke to me through a Chinese lady interpreter. He was a big man about 6-foot tall and weighed over 150 lbs. The interpreter wore spectacles with metal frames and was about 5 feet 3 inches tall and weighed more than 120 lbs. She was always present at my interviews.
3. Firstly by written letter to the Consulate General in May, 1952. On receiving no reply I

called in June, 1952, on one occasion and interviewed the persons described in Reply No. 2.

4. I produced:

(a) Identification Card of the U. S. Army dated 16th February, 1943, issued in Honolulu;

(b) Government Identity Card with a set of fingerprints [23] dated 4th January, 1942, issued in Honolulu;

(c) Hawaii Defense Volunteer Discharge Paper in the name "Yee Yew Lau" dated 5th July, 1945;

(d) Tax Release dated 19th May, 1947—issued in Honolulu;

(e) Letter from the Honolulu Immigration Office certifying that that Office refused to give me back my birth and citizenship certificate and a certificate or letter by one Yee Tim of my birth in Honolulu.

5. No.

6. No.

7. No.

8. Yes.

9. Yes.

10. Yes.

11. No, but he asked me for other evidence, and I said that I had produced all the evidence available. I cannot remember the questions which he asked me.

12. He said "I believe you are not an American Citizen" or words to that effect.

13. Yes.

14. 23rd December, 1952—at about 2:30 p.m. I interviewed an American lady who told me that

no Vice Consul was available in her Department. I delivered to her a typed application which had been sent to me by Mr. W. Y. Char, my attorney. I believed the 23rd December, 1952, to be the last day for the application to be sent in. I was told that I would be sent written notification should there be any news on the subject. In November, 1953, I was informed by an American man in the same Department of the [24] Consulate that a reply from Washington was awaited.

15. Yes.

16. I received a letter to that effect sometime after November, 1953.

17. Only in these proceedings as far as I am aware. I sent all my papers to the said Mr. W. Y. Char.

18. 8th February, 1954.

/s/ LAU AH YEW.

Signed and Affirmed by the Plaintiff, who is not a Christian, this 3rd day of June, 1954, through the Sworn Interpretation of Chan Hwa Hing, Interpreter, to the undersigned Notary at No. 2 Queen's Road Central, Hong Kong, before me:

/s/ CHAN HWA HING,

Interpreter to Messrs. Wilkinson and Grist, Solicitors and Notaries, Hong Kong.

[Seal] /s/ JAMES TEMPLER PRIOR,

Notary Public,

Hong Kong. [25]

[Title of District Court and Cause.]

NOTICE

To: W. Y. Char, Liberty Bank Bldg., Honolulu,
T. H., Attorney for Plaintiff.

You are hereby notified that the foregoing Motion to Strike will be heard before the Honorable J. Frank McLaughlin, Judge of the United States District Court for the District of Hawaii, in his courtroom in the Federal Building, Honolulu, T. H., on Friday, February 4, 1955, at 2:00 p.m., or as soon thereafter as counsel may be heard.

Dated: Honolulu, T. H., this 28th day of January, 1955.

LOUIS B. BLISSARD,
United States Attorney, District of Hawaii, Attorney for Defendant;

By /s/ CHARLES B. DWIGHT, III,
Asst. United States Attorney,
District of Hawaii.

Receipt of copy acknowledged.

[Endorsed]: Filed January 31, 1955. [34]

[Title of District Court and Cause.]

APPLICATION FOR THE ENTRY OF
JUDGMENT BY DEFAULT AGAINST
DEFENDANT

The Plaintiff, by his attorney, W. Y. Char, hereby applies for the entry of judgment by default against the Defendant herein upon the ground that no an-

swer by the defendant has been filed with the clerk of this court within ten days after the filing of the Order Overruling Motion to Dismiss dated May 25, 1954.

This application is based upon all the records and files herein.

Dated: Honolulu, T. H., this 13th day of January, 1955.

LAU AH YEW,
Plaintiff;

By /s/ W. Y. CHAR,
His Attorney. [36]

[Title of District Court and Cause.]

NOTICE OF APPLICATION FOR THE ENTRY
OF JUDGMENT BY DEFAULT AGAINST
DEFENDANT

Sir:

Please take notice that upon the Application for the entry of Judgment by Default Against Defendant, dated the 13th day of January, 1955, and upon all the papers and proceedings had herein, the Plaintiff's Application for the Entry of Judgment by Default Against Defendant, will be presented to the Presiding Judge of the United States District Court for the District of Hawaii, in his courtroom in the Federal Building, Honolulu, T. H., on January 21, 1955, at 2:00 p.m., or as soon thereafter as counsel can be heard for the entry of judgment by

default against Defendant and for such other and further relief as to the Court may seem just and proper.

Dated: Honolulu, T. H., this 13th day of January, 1955.

LAU AH YEW,
Plaintiff;

By /s/ W. Y. CHAR,
His Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed January 13, 1955. [37]

[Title of District Court and Cause.]

ORDER DENYING APPLICATION FOR THE
ENTRY OF JUDGMENT BY DEFAULT
AGAINST DEFENDANT

The application for the entry of judgment by default against defendant having come on to be heard before the court on January 26, 1955, the plaintiff having been represented by his counsel, W. Y. Char, and defendant having been represented by Charles B. Dwight, III, Assistant United States Attorney, the motion having been fully argued and submitted to the court for decision, and the court having found: that plaintiff was not ready to proceed with proof of a prima facie case (Rule 55(c) F.R.C.P.); under the circumstances of this case if a default were entered it could easily be set aside good cause being shown by plaintiff's failure to serve answers to interrogatories on defendant until

time of default hearing; and because of the nature of United States citizenship it should not be granted by default.

Now, Therefore, It Is Hereby Ordered that the application for the entry of judgment by default against defendant be and the same is hereby denied.

Dated: Honolulu, T. H., this 8th day of March, 1955.

/s/ J. FRANK McLAUGHLIN,
Judge of the Above-Entitled
Court.

No Objection to Form:

/s/ CHARLES B. DWIGHT, III.,
Asst. United States Attorney.

[Endorsed]: Filed March 8, 1955. [40]

In the United States District Court for the
District of Hawaii
Civil No. 1254

LAU AH YEW,

Plaintiff,

vs.

JOHN FOSTER DULLES, Secretary of State of
the United States of America,

Defendant.

ORDER TO STRIKE AND TO DISMISS

The Motion to Strike as sham and false of the
Defendant, John Foster Dulles, having come on to

be heard before the Court on February 4, 1955, the Plaintiff having been represented by his counsel, W. Y. Char, Esquire, and the Defendant having been represented by Louis B. Blissard, United States Attorney, and Charles B. Dwight, III, Assistant United States Attorney, the Motion having been fully argued and submitted to the Court for decision, the Court having found the Motion to be well taken on the ground stated therein, namely, that the allegations of the Second Amended Complaint relating to application for a U. S. Passport by Lau Ah Yew, Plaintiff herein, and denial of the same passport application by the U. S. Consul are not substantiated by the Plaintiff's own answers to interrogatories posed by the Defendant concerning these allegations and are consequently sham and false.

Now Therefore, it is hereby ordered, adjudged and decreed that this Second Amended Complaint herein be stricken, and this cause be and the same is dismissed.

Dated: Honolulu, T. H., this 8th day of February, 1955.

/s/ J. FRANK McLAUGHLIN,
Judge, United States District
Court.

No Objection to Form:

/s/ W. Y. CHAR,
Attorney for Plaintiff.

[Endorsed]: Filed February 8, 1955. [42]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO UNITED STATES
COURT OF APPEALS FOR THE NINTH
CIRCUIT UNDER RULE 73(b)

Notice is hereby given that Lau Ah Yew, by W. Y. Char, attorney for plaintiff, does hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final order entered in this proceeding on February 8, 1955, granting the motion to strike the plaintiff's second amended complaint.

Dated: Honolulu, T. H., this 1st day of March, 1955.

LAU AH YEW,

Plaintiff,

By /s/ W. Y. CHAR,

His Attorney.

[Endorsed]: Filed April 7, 1955. [44]

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men by These Presents:

That we, Lau Ah Yew, by his attorney, W. Y. Char, as Principal and Quon Ng Yee and Chang Foon Tong, as sureties, are held and firmly bound unto the United States Court of Appeals for the Ninth Circuit in the full sum of Two Hundred Fifty Dollars (\$250.00) for the payment of which well and truly to be made, we do bind ourselves, our executors and administrators, jointly and severally by these presents,

Whereas, the United States District Court for the District of Hawaii has entered an Order granting the motion to strike plaintiff's second amended complaint, and

Whereas, Notice of Appeal has been given to the United States Court of Appeals for the Ninth Circuit to secure a reversal of said Order,

Now, therefore, the condition of this obligation is such that if said appeal is dismissed or said Order is affirmed, and if said Plaintiff shall pay all costs as the said United States Court of Appeals for the Ninth Circuit may award, then this obligation shall be void, otherwise to remain in full force, effect and virtue. [45]

In Witness Whereof, the above-bounden Principal by his attorney and Sureties have hereto affixed their hands this 1st day of March, 1955.

LAU AH YEW.

By /s/ W. Y. CHAR,
His Attorney.

/s/ QUON NG YEE,

/s/ CHANG FOON TONG.

Territory of Hawaii,
City and County of Honolulu—ss.

Quon Ng Yee and Chang Foon Tong, being first duly sworn on oath, depose and say: That they are

the Quon Ng Yee and Chang Foon Tong named as Sureties and who filed the foregoing Bond and that they are worth the sum of Two Hundred Fifty Dollars (\$250.00) over and above all just debts and liabilities in property situate in the Territory of Hawaii and subject to execution.

Subscribed and sworn to before me this 1st day of March, 1955.

[Seal] /s/ JEANETTE Y. L. LEE,
Notary Public, 1st Judicial Circuit, Territory of
Hawaii.

My commission expires: 9/25/57.

[Endorsed]: Filed April 7, 1955. [46]

In the United States District Court for the
District of Hawaii

Civil No. 1254

LAU AH YEW,

Plaintiff,

vs.

JOHN FOSTER DULLES, etc.,

Defendant.

February 4, 1955

ORAL RULING OF THE COURT

Before Hon. J. Frank McLaughlin, Judge.

The Court: The motion before the Court is one to strike, under Rule 11, the complaint as sham.

The complaint sought thus to be stricken is a second amended complaint. This second amended complaint was found adequate under Rule 8 previously.

When the Government's motion to dismiss the same was denied, for some reason or other within the time limited by the Rules for thereafter answering, the Government did not file a responsive pleading. Accordingly, a short time ago the plaintiff moved for a default judgment under Rule 55-E [49] against the United States. This was denied, for the plaintiff was not ready to proceed to put on a *prima facie* case warranting the issuance of a default judgment.

It was also observed at that time that default judgments with respect to citizenship were not favored by the Court and for good cause shown could be, in the Court's opinion, easily set aside. Therefore, in the interests of justice I allowed the Government ten days from that date within which to answer the amended complaint; said ten days have not yet expired, tomorrow being the tenth day.

In the meantime within said ten days this motion now before the Court to strike the second amended complaint as sham has been filed, and filed on the basis of interrogatories answered by the plaintiff but never served as required until the date upon which I denied the default judgment upon the United States.

The amended complaint alleges that: "The plaintiff in June, 1952, personally applied at the Amer-

ican Consulate General at Hong Kong for a United States passport." It also alleges in this complaint that the plaintiff on this date called on the Consul and made known his wishes and exhibited his documents, that "it was the opinion of the Vice Consul that the proof offered and presented to him was insufficient to establish plaintiff's United States citizenship; that by [50] reason of said Vice Consul's refusal to issue to plaintiff a United States passport, he, plaintiff, against his will was forced to continue to reside in a foreign country." The complaint goes on to describe a denial of rights based on this type of allegation.

As disclosed by the answers by the plaintiff to the interrogatories put to him by the Government, the plaintiff did not file an application for a passport. Filing an application for a passport is a very precise and definite written act which requires the performance of certain formalities outlined in the Code of Federal Regulations, Title 22, Section 54.14, 54.23, all of which provisions of the Code are applicable to applying for passports in foreign countries of the Foreign Service of the United States, Title 22, Code of Federal Regulations, Section 107.3.

It is quite obvious here from the answers of the plaintiff to the interrogatories that what he did was to inquire about the wisdom, feasibility of his spending his money to file a formal application. It appears, also, that as a result of the conversation that he had with the Consul—I draw this conclusion from the allegations of his complaint and from his

answers to the interrogatories—that the Consul, as a courtesy, reviewed his contention in the light of the documentary evidence that he had, and [51] apparently told him that he was wasting his time and money unless he had more to substantiate his claim, and that he should not then and there file a formal application for a passport.

In any event, not only was there no formal application for a passport, but whatever application there was, informal or otherwise, it was not denied, for if there be any denial of any description to be deduced from these allegations, it is simply that the Consul indicated that the claimant had not sufficiently identified himself as the person he represented himself to be, namely, a certain United States citizen.

The plaintiff says that he does have a birth certificate, but he has not produced it or a copy thereof either to the Consul or in conjunction with his pleadings in this case.

In any event, based on the allegations, which are specific, and the answers, one is forced to conclude that the two do not fit together. It appears that the allegations are simply made out of whole cloth in order to stay in court. They are entirely lacking in substance. The plaintiff, the real party, not his attorney, who knows what the facts are, shows that he did not have a right or privilege as a citizen of the United States denied to him, for he never squarely and formally asked for anything on that basis. [52]

He may be a citizen or not. The fact that this complaint is now stricken does not mean that he is not a citizen. It simply means that as the pleadings now stand the complaint is a sham and he is not eligible for any declaratory relief under Section 903.

I would commend you, Mr. Char, to read Rule 11 and reflect on the last two sentences of the Rule.

The motion to strike is granted.

Reporter's Certificate

I, Elbert Cripps, Official Court Reporter, U. S. District Court for the District of Hawaii, do hereby certify that the foregoing is a true and correct transcript of the proceedings reported and transcribed by me in Civil No. 1254, Lau Ah Yew, plaintiff, vs. John Foster Dulles, etc., defendant, on February 4, 1955.

/s/ ELBERT CRIPPS,

Official Court Reporter.

February 17, 1955.

Received February 16, 1955. [53]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Hawaii—ss.

I, William F. Thompson, Jr., Clerk of the United States District Court for the District of Hawaii, do

hereby certify that the foregoing record on appeal in the above-entitled cause, numbered from Page 1 to Page 55, consists of a statement of the names and addresses of the attorneys of record and of the various original pleadings and transcript of proceedings as herein below listed and indicated:

Second Amended Complaint.

Motion to Dismiss Second Amended Complaint, Memorandum of Points and Authorities, and Notice of Motion to Dismiss.

Order Overruling Motion to Dismiss.

Motion to Strike (Interrogatories by Defendant—copy) (Plaintiff's Answers to Interrogatories Made by Defendant on 25th Day of May, 1954—original), Memorandum of Points and Authorities, and Notice.

Application for the Entry of Judgment by Default against Defendant, Notice of Application for the Entry of Judgment by Default against Defendant, and Points and Authorities. [56]

Order Denying Application for the Entry of Judgment by Default against Defendant.

Order to Strike and to Dismiss.

Notice of Appeal to the United States Court of Appeals for the Ninth Circuit under Rule 73(b), and Bond on Appeal.

Designation of Record on Appeal.

Transcript of Proceedings, February 4, 1955, (Oral Ruling of the Court).

Counter-Designation of Record on Appeal.

In Witness Whereof, I have hereunto set my

hand and affixed the seal of said District Court, this 26th day of April, 1955.

[Seal] /s/ WM. F. THOMPSON, JR.,
Clerk, U. S. District Court,
District of Hawaii. [57]

[Endorsed]: No. 14753. United States Court of Appeals for the Ninth Circuit. Lau Ah Yew, Appellant, vs. John Foster Dulles, Secretary of State of the United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Hawaii.

Filed May 3, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14753

LAU AH YEW,

Plaintiff-Appellant,

vs.

JOHN FOSTER DULLES, Secretary of State of
the United States of America,

Defendant-Appellee.

APPELLANT'S STATEMENT OF POINTS

The appellant respectfully submits the following statement of points upon which he intends to rely on appeal:

1. The district court erred in denying appellant's Application for the Entry of Default upon the ground that no answer by the appellant had been filed with the clerk of the district court within ten days after the filing of the Order Overruling Motion to Dismiss.

2. The district court erred in granting the Motion to Strike and to Dismiss the Amended Complaint upon the ground that the allegations of the Second Amended Complaint relating to the application for a United States passport, and denial of the same passport application by the United States Consul were not substantiated by the appellant's answers to interrogatories.

Dated: Honolulu, T. H., this 16th day of April, 1955.

/s/ W. Y. CHAR.

Receipt of copy acknowledged.

[Endorsed]: Filed May 3, 1955.

No. 14885 ✓

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JACK BROWN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

TOBIAS G. KLINGER,

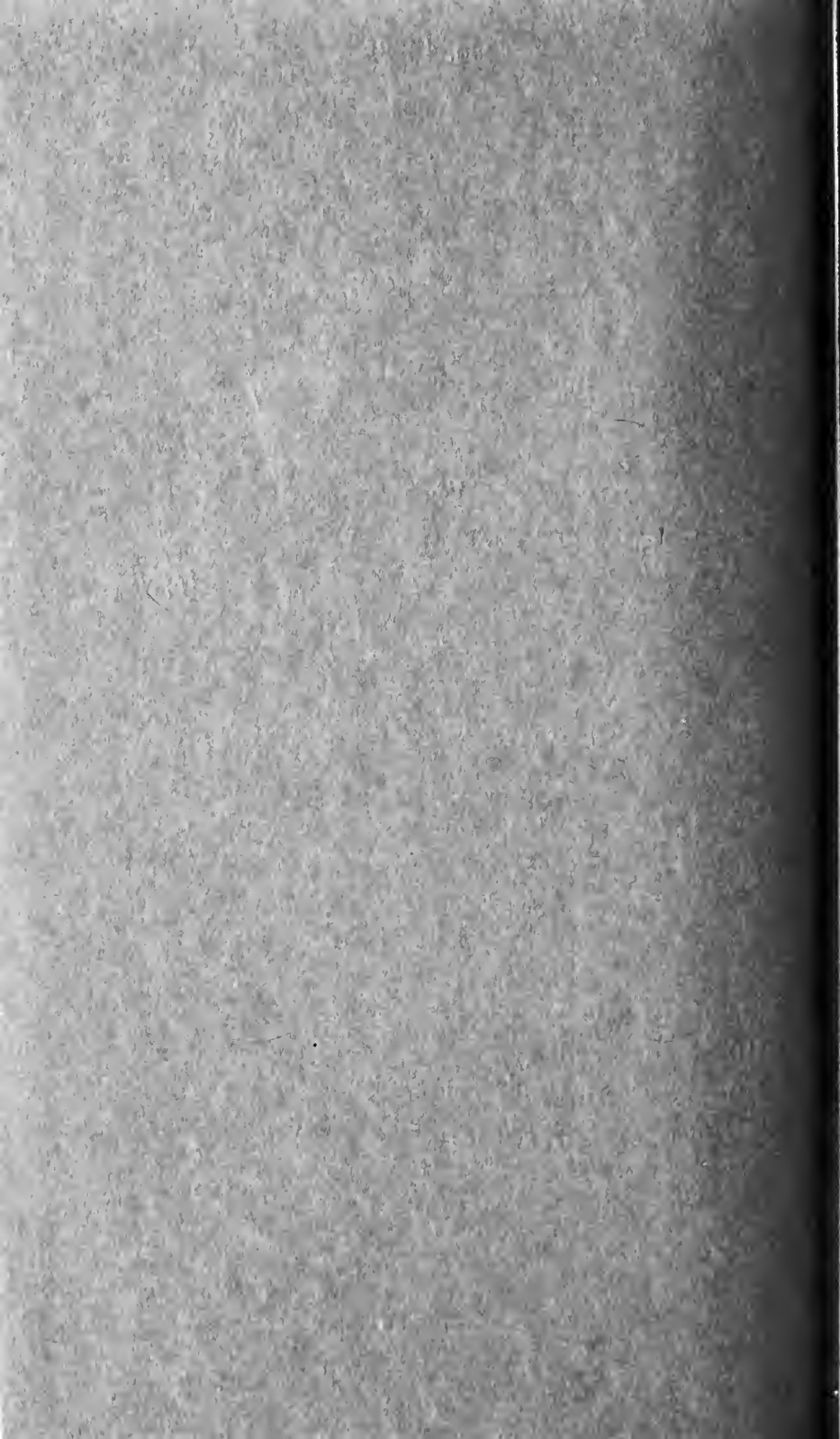
610 South Broadway,
Los Angeles 14, California,

Attorney for Appellant.

FILED

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PAUL P. O'BRIEN, CLERK



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No. 14885

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JACK BROWN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

Appellee's brief places certain distorted interpretations upon some of the facts of this case that were neither suggested nor raised at the hearing, and then draws totally unwarranted inferences from such misinterpretations. Appellant therefore takes this opportunity to correct such distortions.

1. Insurance.

Appellee states as a fact that Appellant *himself* paid \$620.00 per year in life insurance premiums and interest on life insurance loans during all five years of the probationary period (Appellee's Br. pp. 8-9 and 13). Actually, the facts brought out on Appellee's own cross-examination of Appellant show that Appellant's whole family made the payments and that Appellant was living

on his relatives' charity. Appellant testified [Tr. August 22, 1955, p. 57, lines 6-21]:

“Q. Since 1952 has there been any sum paid on these insurance policies in excess of \$620 a year? A. The only amount that was paid on the insurance policies what was really necessary to keep the policies alive.

Q. And who has paid that sum? A. Well, when I didn't have enough I borrowed some from my children to do it. Mrs. Brown saw to it that the amounts were available when they were due in order not to lose the entire insurance, because at my age I couldn't go out and get any other insurance.

Q. In other words, Mrs. Brown made the payments? A. Well, yes, with my help—we tried to help each other to stay afloat.

Q. Have you repaid any sums to the individuals who helped make the payments? A. Not that I know of.”

2. Living Expenses.

Appellee further makes the unwarranted charge that in 1954, Appellant, with his wife, had an additional \$6,170.83 of income, basing this charge on two unrelated matters in the Buntin affidavit [App. Ex. B]. Because this affidavit states that the Browns charged personal living expenses to Mrs. Brown's drawing account, Appellee states that the \$6,170.83 of “Other Expenses” in the condensed statement of Profit and Loss of National Furniture Company must be all living personal expenses (Appellee's Br. pp. 10-11).

No such attack was made by Appellee at the hearing, nor was a single question asked concerning it. Nor did the Court refer to it at any time, either during the hearing or at its conclusion. Appellant thus had no occasion

to meet this extraordinary charge by pointing out exactly what business expenses—such as utilities, insurance, legal and accounting, office supplies, freight and shipping, telephone, repairs, and other similar and customary items not covered elsewhere in the affidavit—made up this item. But that this \$6,170.83 contains no personal living expenses is made clear by a further statement in the Buntin affidavit which Appellee wholly overlooks. [App. Ex. B, last paragraph on p. 1]:

“THAT in the year 1954 there was only a net profit of One Thousand Two Hundred Twenty-three Dollars and Sixty-one Cents (\$1,223.61) from the operations of the National Furniture Company, which together with a salary of Fifty Dollars (\$50.00) per week of Jack Brown, gave an adjusted gross income subject to United States Federal Taxes of Three Thousand Eight Hundred Twenty-three Dollars and Sixty-one Cents (\$3,823.61)”;

This \$3,823.61 of gross income subject to Federal Income Taxes is arrived at after deducting the \$6,170.83 of “Other Expenses” from the total gross income. It can be judicially noted that personal living expenses cannot be deducted in computing gross income for Federal Tax purposes.

3. Salary.

Appellee also complains because Appellee’s interpretation of the evidence indicates that a delivery boy was paid more salary in 1954 than Appellant (Appellee’s Br. p. 10). Again, no such attack was made at the hearing so Appellant had no chance to explain the item further. The difficulty here is that Appellee and the Court below cannot seem to understand, despite all the evidence so establishing, that Appellant and his wife have been barely eking out a marginal existence helped only by the charity of

their children. The fact of a delivery boy earning more than Appellant is quite in accord with the conditions under which Appellant was actually living, and is "incongruous" (as Appellant describes it) only to one holding a completely unsubstantiated belief in Appellant's hidden fortune.

4. Conclusion.

Appellee's arguments above emphasize again the contrast between Appellant's actual straitened circumstances and Appellee's unfounded belief in Mr. Brown's imagined hidden wealth. In reply to those portions of Appellant's Brief pointing out the Court's reliance below on Appellant's supposed hidden wealth, and the complete lack of any evidence whatsoever, despite searches made for it, to support such belief, Appellee offers no facts, but only the statement (Appellee's Br. p. 18).

"The United States Attorney does not agree as suggested, that Appellant has no assets hidden away"

Therefore, Appellant again urges that the facts and arguments outlined in Appellant's opening brief establish that there is no substantial evidence to support the findings of the Court on which the revocation of probation is based, and that the revocation was an abuse of the Court's discretion.

Appellant therefore prays that this Court set aside the order of the Court below revoking and terminating Appellant's probation, and vacate and set aside the sentence imposed.

Respectfully submitted,

TOBIAS G. KLINGER,

Attorney for Appellant.

No. 14885

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JACK BROWN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF

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FILED

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No. 14885

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JACK BROWN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF

I.

Statement of Jurisdiction.

On November 16, 1949, Honorable William C. Mathes, Judge, United States District Court for the Southern District of California, sentenced appellant, on his plea of *nolo contendere* to three misdemeanor counts alleging violations of Section 633 of Title 50, Appendix, United States Code, to imprisonment for one year and to pay a fine of \$10,000.00 on one count, suspended the imposition of sentence on the other two counts, and placed him on probation for five years after his release from custody, on condition that he pay a fine of \$20,000.00 [Govt. Ex. 8, Judgment of Nov. 16, 1949]. By Judgment entered on August 26, 1955, the same Court revoked and terminated its prior probationary order, pursuant to Section 3653 of Title 18 of the United States Code, and sentenced

appellant to two years imprisonment and to pay a fine of \$20,000.00 [Govt. Ex. 8, Judgment of Aug. 26, 1955].

On August 31, 1955, appellant filed his Notice of Appeal to this Court from the Judgment of August 26, 1955, pursuant to Section 1291 of Title 28 of the United States Code [R. p. 2].

II.

Concise Statement of the Appeal and Questions Presented.

The original Judgment of November 16, 1949, placed appellant on probation for five years on the condition, among others, that during the probationary period appellant should pay to the United States of America a fine of \$20,000.00 "*such fine to be paid at such times and in such installments as the Probation Officer of this Court shall direct*" [Govt. Ex. 8, Judgment of Nov. 16, 1949].

On July 22, 1955, the Probation Officer filed a petition asking the United States District Court for the Southern District of California to issue a bench warrant for the return of appellant before the Court to show cause why the probationary order previously entered should not be vacated and sentence imposed [Govt. Ex. 8, Petition of Chief Probation Officer of July 22, 1955]. A hearing was held and evidence was presented on August 22, 1955 [Tr. Aug. 22, 1955].

By Judgment entered on August 26, 1955, the Court found that appellant had wilfully failed to make any payment since June 20, 1951, on the fine imposed as a condition of probation, that appellant at all times had the ability so to do, and that in July, 1955, appellant stated he had no intention to pay any part of the fine. The Court fur-

ther found that appellant had thus violated the conditions of probation and of the probation order of November 16, 1949, and thereupon revoked and terminated the probationary order and sentenced appellant to imprisonment for two years and a fine of \$20,000.00 [Govt. Ex. 8, Judgment of Aug. 26, 1955].

Appellant raises on this appeal the following questions:

(1) Whether or not, as a matter of law, there has been a violation of the conditions of probation, in that at no time did the Probation Officer issue any directions to appellant either as to the times of payment of the fine imposed or the installments in which said fine should be paid, as required by the original Judgment of November 16, 1949; and

(2) Whether, even if valid directions for payment of the fine were given by the Probation Officer, there is substantial evidence to support the Court's findings in its Judgment of August 26, 1955; and

(3) Whether, in view of the evidence at the hearing on August 22, 1955, and the prior proceedings in this case, the Court acted in excess of its discretion in revoking and terminating appellant's probation; and

(4) Whether the Court below erred in admitting in evidence over appellant's objection six letters [Govt. Exs. 1-6] not from the Probation Officer, but from the United States Attorney's Office, directed to appellant and relating to payment of the fine.

III.

Specification of Errors.

Appellant asserts that the Court below committed the following errors:

(1) The Court below erred in making the finding that: “. . . defendant has violated the conditions of probation and of the probation order of Nov. 16, 1949” [Govt. Ex. 8, Judgment of Aug. 26, 1955], in that the condition allegedly violated was that appellant pay a fine of \$20,000.00,

“such fine to be paid at such times and in such installments as the Probation Officer of this Court shall direct” [Govt. Ex. 8, Judgment of Nov. 16, 1949], and there is no substantial evidence that any directions as to times of payment or installments to be paid were ever given appellant. This specification is discussed below in Part VI-A of this brief.

(2) The Court below erred in making the findings that: “. . . defendant has wilfully failed to make any payment since June 20, 1951, on the fine imposed as a condition of probation, and that the defendant has at all times had the ability so to do” [Govt. Ex. 8, Judgment of Aug. 26, 1955],

in that there is no substantial evidence that appellant had the ability at all times to make payments on the fine and in that, on the contrary, appellant, being unable to pay, could not wilfully fail to pay. This specification is discussed below in Part VI-B of this brief.

(3) The Court below erred in making the finding that: “. . . in July of this year, the defendant stated he had no intention to pay any part of the fine” [Govt. Ex. 8, Judgment of Aug. 26, 1955],

in that there is no substantial evidence to sustain this finding. This specification is discussed below in Part VI-C of this brief.

(4) The Court below abused its discretion in revoking and terminating appellant's probation in that there was no substantial evidence of any violation of the conditions of probation. This specification is discussed below in Part VI-D of this brief.

(5) The Court below abused its discretion in revoking and terminating appellant's probation in that the Court revoked and terminated such probation on the basis of conjecture and surmise, unsupported by any evidence whatever. This specification is also discussed below in Part VI-D of this brief.

(6) The Court erred in admitting in evidence, over timely objection, six letters to appellant [Govt. Exs. 1-6] from the United States Attorney's Office—not from the Probation Office—relating to payment of the fine. This specification is discussed below in Part VI-E of this brief.

IV.

Statement of the Case.

On September 8, 1949, Judge William C. Mathes of the United States District Court for the Southern District of California accepted a plea of *nolo contendere* from appellant to three misdemeanor counts of a seventeen count indictment [Tr. Sept. 8, 1949, p. 9, lines 10-15]. The first of those three counts (Count 6) charged appellant with beginning construction on a house when such construction was not authorized under the appropriate priority orders. Each of the other two counts (Counts 7 and 8) charged appellant with selling to a person without a priority rating a prefabricated house into which were

incorporated priority materials [Govt. Ex. 8, Indictment filed April 27, 1949].

In the Pre-sentence Report of September 26, 1949, the Probation Officer stated:

“This defendant does not impress the writer as being in need of probationary supervision, nor does it appear that institutional treatment would serve any useful purpose. It is therefore respectfully suggested that imposition of a fine might be an appropriate disposition.” [Govt. Ex. 7, Pre-Sentence Report, Sept. 26, 1949, last paragraph.]

This same report disclosed that appellant had never been in any difficulty with the law before, and had never before even been arrested.

At the formal hearing on September 27, 1949, the Government recommended as sentence a fine of \$2,000.00 on each count, or a total of \$6,000.00 [Tr. Sept. 27, 1949,¹ p. 16, lines 19-20]. The Court continued the matter for the purpose of obtaining additional information as to the profits of appellant [Tr. Sept. 27, 1949, p. 26]. On November 16, 1949, the Government made a second recommendation of a sentence of a fine of \$5,000.00 on each count, or a total of \$15,000.00 [Tr. Nov. 16, 1949, p. 46, lines 9-10].

The formal Judgment of November 16, 1949, sentenced appellant to one year's imprisonment and a fine of \$10,000.00 on Count 6, the maximum permitted by law, appellant to be imprisoned until the fine be paid or he be

¹The Transcript Volume whose cover bears only the date of “Thursday, September 8, 1949” contains also the transcripts of September 27, 1949, October 5 and 14, 1949, November 16 and 21, 1949, December 12, 1949, and January 12, 1950.

otherwise discharged, and further suspended imposition of sentence on Counts 7 and 8 and placed appellant on probation for five years commencing on his release from custody. One condition of probation was that during the probationary period the appellant should pay to the United States of America a fine of \$20,000.00, "*such fine to be paid at such times and in such installments as the Probation Officer of this Court shall direct*" [Govt. Ex. 8, Judgment of Nov. 16, 1949]. There is no contention that any other condition of probation was violated.

On January 13, 1950, at a hearing on appellant's motion for reduction of this sentence before Judge Mathes, the Government stated [Tr. Jan. 13, 1950, p. 11, lines 6-10]:

"Our recommendation the last time was a \$15,000 fine, and that is our recommendation again. The Government would not object to a reduction in the jail sentence to three months or admission of the defendant to probation if the court feels that is a proper sentence."

The motion for reduction of sentence was nevertheless denied [Tr. Jan. 13, 1950, p. 34, lines 16-25].

Appellant thereupon served his jail sentence under Count 6, plus an additional thirty days for being unable to pay the fine imposed thereon [Tr. Aug. 22, 1955, p. 46, lines 21-25], and was released from prison on November 15, 1950 [Govt. Ex. 7, POG Report of Nov. 20, 1950]. During 1951, appellant made a payment of \$1,500.00 which was applied on his fine of \$20,000.00 [Tr. Aug. 22, 1955, p. 61, line 24, to p. 62, line 4; pp. 80-81].

On August 15, 1951, appellant filed a petition to terminate probation and to remit the fine [Govt. Ex. 8, Petition filed Aug. 15, 1951]. The minutes of the hearing

recite the statement of the Assistant United States Attorney that the "Gov't has no objection to terminating probation and reducing fine" [Govt. Ex. 8, Minutes of Court, Sept. 10, 1951]. The Court denied the petition "without prejudice" [Govt. Ex. 8, Order of Dec. 12, 1951, filed Dec. 13, 1951], the minutes reciting "May be renewed on changed conditions if counsel is so advised" [Govt. Ex. 8, Minutes of Court, Nov. 19, 1951].

The petition for the revocation and termination of appellant's probation was filed on July 22, 1955 [Govt. Ex. 7]. After hearing, the Court, through Judge Mathes, entered its Judgment on August 26, 1955, revoking and terminating the probationary order and sentencing appellant to one year and \$10,000.00 on each of Counts 7 and 8, to run consecutively, or a total of two years and \$20,000.00, appellant to stand committed until the fine be paid or he be otherwise discharged as provided by law [Govt. Ex. 8, Judgment of August 26, 1955]. With respect to each of these counts, as with Count 6 earlier, this is the maximum imprisonment and the maximum fine permitted by law.

The uncontradicted facts as to appellant's earnings are contained primarily in his own monthly reports to the probation office [Govt. Ex. 7, Monthly Reports of appellant, Dec. 4, 1950-July 4, 1955] which appellant faithfully and regularly prepared and filed. There is no suggestion that they are inaccurate in any particular.

During the time between his release from prison on November 15, 1950, and December 15, 1951, appellant was unable to obtain any sort of job. During this year appellant earned only \$32.00 (commission for selling lumber) [Govt. Ex. 7, Monthly Report, April 4, 1951], and

received a \$200.00 bonding company refund in connection with prior litigation [Govt. Ex. 7, Monthly Report, Nov. 5, 1951]. From December 15, 1951, until June 4, 1952, appellant worked for one, Oscar Rudnick, receiving \$3,-750.00, his only earnings of any consequence during the whole period of his probation [Govt. Ex. 7, Monthly Reports, Jan. 4, 1952-July 2, 1952]. At that time—nor at any time until more than 3 years later—no complaint was made to the Court that appellant was not living up to his probation [Tr. Aug. 22, 1955, p. 20, lines 15-20]. Moreover, it is not contradicted that part of these earnings had to be used for a down payment on an automobile required by appellant in order to perform his job for his employer [Tr. Aug. 22, 1955, pp. 40-41].

Thereafter, appellant was unable to find any work for three and one-half more months [Govt. Ex. 7, Monthly Reports, July 2, 1952-Oct. 1, 1952]. From September 15, 1952, until his arrest in this matter, he worked as a furniture salesman, first at \$200.00 per month and subsequently at \$50.00 per week [Govt. Ex. 7, Monthly Reports, Oct. 1, 1952-July 4, 1955]. After August 1, 1953, this employment was at a primarily used furniture store run by appellant's wife [Govt. Ex. 7, Monthly Report, Sept. 2, 1953]. Thus appellant's earnings during the entire 4 years, 7½ months period of probation, based upon the uncontradicted evidence, were:

1950 (1½ months)	Nothing
1951	\$1,232.00
1952	3,350.00
1953	2,400.00
1954	2,600.00
1955 (6 months)	1,300.00

This is an average of only \$195.00 per month.

The used furniture store of appellant's wife was known as National Furniture Company and operated in 1954 at a net profit of \$1,223.61, after paying appellant a total salary of \$2,600.00 [Deft. Ex. B, Affidavit of Ralph O. Buntin]. Appellant's wife had opened this store in the middle of 1953, with loans totaling approximately \$5,000.00 from her children [Deft. Ex. A, Affidavit of Lilian Brown Prusan of Aug. 15, 1955; Deft. Ex. C, Affidavit of Ruth Brown Miller of Aug. 15, 1955; and Deft. Ex. D, Letter of Stanley Brown of Aug. 5, 1955]. It was a family store in which both appellant and his wife worked long and hard [Tr. Aug. 22, 1955, p. 45, line 7, to p. 46, line 9] and from which they barely made their living. Its credit rating was bad [Deft. Ex. E].

At the time of sentence in November, 1949, appellant's property was not substantial, consisting of a house bought with his wife's money for \$23,000.00—subsequently sold for \$15,000.00 or \$16,000.00 [Tr. Aug. 22, 1955, p. 59, lines 23-25]—(with a \$7,600.00 encumbrance), a 1946 Oldsmobile, \$240.00 in the bank, \$500.00 in Government Bonds, \$50.00 of stock, some furniture and personal belongings, and \$15,000.00 face amount of life insurance on which he had borrowed to the limit [Govt. Ex. 8, Affidavit of Jack Brown, filed Dec. 6, 1949; Govt. Ex. 7, Pre-Sentence Report of Sept. 26, 1949]. The only substantial asset, appellant's wife's house, was sold in 1951, pursuant to an arrangement whereby the Government released its lien and appellant paid \$1,500.00 on the fine [Govt. Ex. 7, Letter of Feb. 15, 1951, Brown to Tolin; Letter of March 28, 1951, Meador to Tolin; Tr. Aug. 22, 1955, p. 61, line 24, to p. 62, line 4]. *At the time of this \$1,500.00 payment, appellant had none of the above assets left except the borrowed-on insurance policies* [Govt. Ex. 8, Affidavit of

Jack Brown filed Oct. 25, 1951]. The house, as stated, was sold and the proceeds remaining eventually wound up in an \$11,500.00 home in Bakersfield encumbered by \$9,500.00 of mortgages [Tr. Aug. 22, 1955, p. 58, lines 1-24].

In 1951, the Probation Office requested an FBI investigation of appellant's finances, stating [Govt. Ex. 7, Letter of June 8, 1951, Meador to Tolin]:

"As the matter now stands, Brown informs me that he is unemployed, and is without funds, and is being supported by relatives. That he has no property except an equity in his home, against which your office has placed a lien. *I have not been able to make any collection program with this man* because of these allegations." (Emphasis supplied.)

This investigation of appellant lasted into 1952 [Govt. Ex. 7, Report of MAS, June 2, 1952]. No evidence contradicting the facts offered by appellant as to his financial condition during the probationary period was offered by the Government at the hearing for revocation of probation, nor does any appear anywhere in the record.

At the time of the original sentence, there was a dispute between the Government and appellant as to the profit appellant allegedly made in 1946 through the sale of material for houses [Cf., Govt. Ex. 8, "MEMORANDUM REGARDING SENTENCE OF JACK BROWN: PROFITS—FEDERAL HOUSING ADMINISTRATION VIOLATION," filed Jan. 12, 1950]. Appellant contended any profits he might have made were wiped out by losses in 1946, 1947, and 1948, and the Government conceded [Tr. Jan. 13, 1950, p. 3, lines 9-12]:

"It may well be true that in the years 1946, '47 and '48, during the time when Brown and his asso-

ciates were in business, looking at all of the transactions of all of the corporations, they came out with less than they started with.” (Emphasis supplied.)

[See, also Govt. Ex. 8, “MEMORANDUM RE SENTENCE OF JACK BROWN: PROFITS FROM FEDERAL HOUSING ADMINISTRATION VIOLATION,” filed Oct. 12, 1949, p. 2, lines 1-5].

Appellant contended that after his enterprises were liquidated in 1948, he had no funds left [Govt. Ex. 8, Affidavit of Jack Brown, Oct. 23, 1951, filed Oct. 25, 1951]. *There is no evidence whatever in the record of any other assets or property owned or controlled by appellant other than those discussed above.*

V.

Summary of Argument.

A. The Probationary Order Delegated to the Probation Officer the Sole Authority to Direct Appellant as to the Times and Installments in Which the Fine Was to Be Paid. No Such Directions Were Given. Appellant Could Not Therefore Be Properly Held to Have Violated Such Non-existent Directions.

Appellant's 5 year probation was revoked just 4 months prior to its expiration for an alleged wilful failure to pay during the probationary period a \$20,000.00 fine imposed as a condition of such probation. The Court's judgment stating the conditions of probation commanded that said fine be paid “at such times and in such installments as the Probation Officer of this Court shall direct.”

No such directions were ever given appellant. The Chief Probation Officer conceded that no “definite” or “specific” instructions or directions were given. There were no written directions of any character from the Pro-

bation Officer. Dunning letters to appellant from the United States Attorney, admitted over objection, cannot supply this fatal deficiency, for under the Court's judgment the times and installments of payment were to be fixed only by the Probation Officer. No delegation of authority could be or was made. And even the letters from the United States Attorney did not purport to give any directions to appellant as to the times and installments of payment.

Thus, as a matter of law, there having been no compliance with the Court's judgment requiring the giving of definite directions to appellant as to the times and installments in which he was to make payment, appellant cannot be properly held to have violated such non-existent conditions.

B. Appellant Throughout the Probationary Period Struggled to Earn a Living and Was Unable to Make Payments on the Fine. His Failure to Make Payments Was Thus Not Willful.

Appellant made no payments upon the fine after a \$1,500.00 payment on June 20, 1951, because, as the evidence makes abundantly clear, he was unable to do so. His earnings during his four and one-half years of probation averaged only \$195.00 per month. He was nearly sixty and in poor health. He had periods of unemployment. During the last two years appellant and his wife worked long and hard in a small furniture store in Bakersfield struggling to earn and preserve a marginal existence. This store, dealing primarily in second-hand furniture, was begun with money borrowed from appellant's children.

Appellant reported his income regularly each month to the Probation Office for the more than four and one-

half years of his probation. There is no contention that they were other than accurate. He was visited or had personal interviews with various probation officers at least nineteen times. The Probation Office file discloses that at no time until the petition for revocation was filed was there any suggestion or intimation to appellant that he was violating any of the conditions of his probation. This fairly reflects the attitude and appraisal of the agency which knew appellant's economic situation best. No change of any kind in appellant's circumstances occurred at or prior to the revocation petition.

The Court below erred in finding that appellant had "wilfully" failed to make payments on the fine while "at all times" having the ability to do so. There is no substantial evidence to support this finding; all the substantial evidence is to the contrary.

C. Appellant Was Always Willing to Pay the Fine if He Could, and Never Expressed an Intention Not to Pay Any Part of the Fine.

The Court's finding that on July 14, 1955, appellant stated that he had no intention of paying the fine is based entirely upon the equivocal and confused testimony of Probation Officer Algots who was visiting appellant for the first time. This is denied by appellant. What he did say was that he was not paying the fine because he had no assets.

The alleged blunt refusal to pay is totally out of harmony with the history of appellant's long and cooperative relations with the Probation Office. He plainly lived up to every other condition of probation throughout the entire period. No other Probation Officer ever reported any such declaration by appellant before. And it would

appear to be contradicted by Algots' own letter-report that the interview was "friendly and forthright." Even in Algots' letter-report the alleged statement is coupled with appellant's statement that he had no assets.

**D. The Court Abused Its Discretion in Revoking
Appellant's Probation.**

The power of a Court to revoke probation is not unlimited. It is a judicial power to be judicially exercised "in accordance with familiar principles governing the exercise of judicial discretion." *Burns v. United States*, 287 U. S. 216, 222-223 (1932).

The lack of substantial affirmative evidence to support the findings of the Court below upon which the revocation of appellant's probation is based establishes that the Court acted in excess of its jurisdiction. That the revocation of probation was based upon and motivated by conjecture and unfounded suspicion rather than factual evidence is shown by the record. Throughout, the Court below has held to and repeatedly announced the fixed belief—despite overwhelming evidence to the contrary—that appellant has, and has always had, substantial concealed assets "salted away."

Not only is this denied by appellant and refuted by every aspect of his life during the past five years, but neither the Government through the United States Attorney nor the Probation Office—with all the facts at their command—has contended that appellant has any hidden or concealed assets. Nor was it charged in the petition for revocation. Yet it emerges as the real ground of decision and thus constitutes an abuse of judicial discretion.

E. The Letters to Appellant From the United States Attorney Were Improperly Admitted. The Probationary Order Authorized Only the Probation Officer to Give Directions Respecting Payment of the Fine.

The admission into evidence over appellant's objection of six letters from the United States Attorney to appellant requesting arrangements be made to pay the fine was clearly erroneous.

Even if these letters constituted the "direction" as to the "times and installments" called for by the Court's original judgment in which the \$20,000.00 fine was to be paid during the probationary period—which is apparently the basis on which they were admitted—the Court's judgment delegated the authority to fix these conditions only to the Probation Officer of the Court. Under the judgment there could be no valid delegation of this authority to the United States Attorney, nor was there any.

Moreover, the letters on their face are merely the dunning letters of a creditor to a debtor; they do not—and do not purport to—fix or direct terms and conditions of payment. Nor is it even clear that the references to the fine are to the \$20,000.00 fine rather than the earlier \$10,000.00 fine. The latter is more likely.

VI.
ARGUMENT.

A. The Probationary Order Delegated to the Probation Officer the Sole Authority to Direct Appellant as to the Times and Installments in Which the Fine Was to Be Paid. No Such Directions Were Given. Appellant Could Not Therefore Be Properly Held to Have Violated Such Non-existent Directions.

The original Judgment of November 16, 1949, required appellant to pay a fine of \$20,000.00 as a condition of probation, "at such times and in such installments as the Probation Officer of this Court shall direct." Appellant contends that the evidence adduced at the hearing establishes that at no time did the Probation Officer issue any such directions. Hence, as a matter of law, there can not have been any violation of such directions.

In 1951, the Chief U. S. Probation Officer wrote to the then United States Attorney [Govt. Ex. 7, Letter of June 8, 1951, from Meador to Tolin]:

"As the matter now stands, Brown informs me that he is unemployed, and is without funds, and is being supported by relatives. That he has no property except an equity in his home against which your office has placed a lien. *I have not been able to make any collection program with this man because of these allegations.*" (Emphasis supplied.)

Thus, according to the Chief U. S. Probation Officer himself, no directions regarding payment of the fine had been given appellant prior to June 8, 1951, and we must look for such directions, if any, after that date. Further, later in that year Appellant petitioned to have his probation terminated and, while the petition was denied, it was

denied "without prejudice" [Govt. Ex. 8, Order of Dec. 12, 1951, filed Dec. 13, 1951]. This is significant, for after a Court hearing at the end of 1951, there was not only no suggestion that Appellant was violating any of the conditions of his probation, but his right to such termination in the future was recognized. Certainly, had directions been given of which Appellant was then in violation this would have been made very clear by the Probation Office and the Government at that time. Yet the Government, in the face of the foregoing evidence, now relies strongly—if not entirely—to support its position that "directions" had been given, upon an alleged oral statement one of the probation officers reported he had made to Appellant back in 1950 that he make "regular monthly payments, even if the payments were small." [Govt. Ex. 7, POG Report of Nov. 20, 1950.]

The Government offered in evidence at the hearing the entire file of the Probation Office [Govt. Ex. 7]. In the whole file, the only material that might even be seriously urged to be a "direction" to pay is the report just referred to of a visit on *Nov. 20, 1950*—approximately 5 years before revocation of Appellant's probation—of a Probation Officer to Appellant [Govt. Ex. 7, POG Report of Nov. 20, 1950]. However, as pointed out, the Chief Probation Officer himself, *in 1951*, did not consider that any directions for payment had yet been given to Appellant [Govt. Ex. 7, Letter of June 8, 1951, Meador to Tolin].

In the period between appellant's first conversation with a probation officer in 1950 and the time of revocation of his probation, appellant had paid \$1,500.00 on his fine [Tr. Aug. 22, 1955, p. 61, line 24, to p. 62, line 4]. No directions or suggestions from the Probation Office

as to times and amounts of payments to be made on the fine appear in either the Probation Office file [Govt. Ex. 7] or the official Court file [Govt. Ex. 8] after that payment. *In all the numerous reports of the numerous visits of the Probation Officers thereafter, contained in Government Exhibit 7, there is no report of even any suggestions, let alone directions, that appellant make any payments on the fine.*

The lack of such direction was not a mistake or error on the part of the Probation Officers. It fairly reflects the exercise of their "good judgment" and their appraisal of the situation. [Tr. Aug. 22, 1955, p. 21, lines 4-20]. They were intimately acquainted with appellant's poor financial situation and knew that appellant could not make payments. Any directions to pay, they fully realized, would thus be useless and unreasonable.

In their judgment, it is apparent, based upon their knowledge of appellant's circumstances, the giving of such directions would have been futile. Hence none were given. Appellant remained on probation reporting regularly and having repeated personal contact with the Probation Office for 4 years, 7½ months. If he had been in constant and continuous violation of his probation almost from the outset as is now asserted—and as the Court below found—it would certainly have been reported to the Court long before. No such report was made and no suggestion of violation appears anywhere in the thick and voluminous Probation Office file [Govt. Ex. 7]. This is powerfully persuasive evidence of the non-existence of any such violation.

In his testimony at the revocation hearing, the Chief U. S. Probation Officer admitted that no "definite amount" was ever set for appellant to pay and that no "definite"

or “specific instruction” was ever given appellant by the Probation Office [Tr. Aug. 22, 1955, pp. 9, 18]. Appellant himself testified that he was never given any directions as to specific payments to be made upon the fine [Tr. Aug. 22, 1955, pp. 47, 48].

Typical of the attitude of the Probation Office since 1951 is the report of AWB of March 24, 1955 [Govt. Ex. 7]:

“Subject has never made any payments on his fine and it is doubtful that he ever will. There is little or nothing that anyone can do in this regard, as apparently he is without assets.”

The fact that appellant has received a sentence of imprisonment twice as heavy on the revocation of probation as the original sentence imposed emphasizes how vitally important it is that there be no question that appellant wilfully ignored Probation Office *directions* as to *times* and *amounts* of payments, as the original judgment required, not merely hints or suggestions. On this record, however viewed, it must be concluded that such directions were never given and were totally absent.

In an attempt to muster some evidence that would be considered substantial of directions to appellant, the Government relies upon six letters—admitted over objection of appellant—written, not by the Probation Officer but by the United States Attorney, to appellant between September 14, 1951, and March 25, 1954, concerning payments on his fine² [Govt. Exs. 1-6]. While there was

²While the letters are not clear, it is probable that the United States Attorney was trying to effect collection of the original committed fine on Count 6 rather than the \$20,000.00 to be paid as a condition of probation. See, *e.g.*, Letter of March 25, 1954 [Govt. Ex. 6.]

testimony that the Probation Office and the United States Attorney "cooperated" in some undefined way in the collection of fines [Tr. Aug. 22, 1955, p. 8, line 19, to p. 9, line 3], the Probation Office is an arm of the Court, while the United States Attorney is a branch of the executive department. The Court in its judgment gave the *Probation Office* the power to direct payment of the fine on terms and conditions that seemed best to it. This duty obviously cannot be delegated. Nor was there any such delegation. In fact, the Chief United States Probation Officer testified [Tr. Aug. 22, 1955, p. 7, lines 15-18]:

"Q. Mr. Meador, is the U. S. Attorney authorized on your behalf to fix the terms and conditions of probation in so far as they relate to the payment of fines? A. No."

In addition, appellant was never informed that these letters from the United States Attorney were being sent for or on behalf of the Probation Office [Tr. Aug. 22, 1955, p. 50, lines 18-24]. They do not even purport to be from, or to be conveying a message for, the Probation Officer.

Even if they were to be regarded as from the Probation Office, these letters from the United States Attorney on their face are not the *directions* of an arm of the Court, but dunning letters of a creditor to a debtor. Thus, the letter of June 25, 1952, begins [Govt. Ex. 2]:

"This is to let you know that you have not made arrangements to pay the fine. Inasmuch as the Department has requested that you make immediate steps to liquidate this account, we shall expect to hear from you at once in regard to the above matter."

The letter goes on to request appellant to make arrangements to pay in monthly installments "in large amounts."

The next letter, dated February 25, 1953, states [Govt. Ex. 3]:

“For a considerable period of time the Government has endeavored to show you every consideration on your fine.

“Up to this time, however, you have made no effort to take care of your account. It is our hope that you will be inclined to adjust this account as soon as possible. It is difficult to believe that you will do otherwise.”

The final letter, dated March 25, 1954, recites [Govt. Ex. 6]:

“We have repeatedly called your attention to the fact that you have not made a payment on the fine since June 20, 1951. We again urge you to make regular monthly payments on this debt to the Government until the entire amount is liquidated.”

Note that in none of these letters is there any suggestion that appellant was in any way in violation of his probation.

The uncontradicted testimony of appellant was that, on each instance that he received a letter from the United States Attorney concerning his fine, he visited the United States Attorney and discussed with him his inability to pay the fine [Tr. Aug. 22, 1955, p. 47, lines 1-24]. The fact that appellant went on each occasion to the United States Attorney's Office, and the United States Attorney, not the Probation Office, talked to him, demonstrates again how baseless is the Government's claim that these letters from the United States Attorney constitute directions from the Probation Office.

Hence, there is no substantial evidence of any directions to appellant to make payments on his fine. The condition of probation was that he make payments thereon

“at such times and in such installments as the Probation Officer” should direct. No such directions were given. The Probation Officer knew that appellant could not make payments. In the absence of such directions—required by the Court’s judgment laying down the conditions of probation—appellant cannot be said to have violated his probation by failing to abide by such non-existent directions.

B. Appellant Throughout the Probationary Period Struggled to Earn a Living and Was Unable to Make Payments on the Fine. His Failure to Make Payments Was Thus Not Wilful.

In its Judgment of August 26, 1955, the Court specifically found:

“ . . . that defendant has willfully failed to make any payment since June 20, 1951, on the fine imposed as a condition of probation, and that the defendant has at all times had the ability so to do.” [Govt. Ex. 8, Judgment of Aug. 26, 1955.]

Appellant contends that there is no substantial evidence to support these findings of the Court and that the evidence, on the contrary, establishes beyond any reasonable question that appellant was never in a position after June 20, 1951, to make payments on the fine and, hence, could not be charged with wilfully failing to do what he could not do.

During the four and one-half years of probation, appellant earned an average of \$195.00 per month [Govt. Ex. 7, Monthly Reports, Dec. 4, 1950-July 4, 1955]. At the end of that period appellant was sixty years of age [born Nov. 25, 1894, Govt. Ex. 7, Pre-sentence Report of Sept. 26, 1949]. His health was poor at the time of

sentence [Govt. Ex. 8, Affidavit of Philip Yorshis, M. D., filed Dec. 6, 1949] and during probation [Govt. Ex. 7, Monthly Report of Oct. 4, 1954; Tr. Aug. 22, 1955, p. 43, line 17, to p. 44, line 6]. During the last two years of his probation, appellant and his wife had struggled along with a primarily used furniture store in Bakersfield, begun with loans from his children [Deft. Exs. A, C, and D, Affidavits and letter of Lilian Brown Prusan, Ruth Brown Miller, and Stanley Brown, respectively].

Appellant testified concerning this business [Tr. Aug. 22, 1955, p. 45, line 7, to p. 46, line 9]:

“Q. When you started the furniture business, when you started, what kind of items did you put into the furniture store, what kind of inventory did you put in there? A. Well, we put in, as I said before, unpainted furniture, some finished furniture, and then I kept acquiring used furniture as time went on. I put an ad in the paper ‘Used furniture wanted,’ or I would take furniture in trade against some of the items we have in the place.

Q. Did you put some of your own furniture and your children’s furniture in there to sell? A. Yes, we did. At one time we had a 3-bedroom home when one of the daughters stayed with us but since then we have a 2-bedroom little house and we took about half of the furniture out of the house that we don’t need and we have been selling that in the store. And my oldest daughter had a lot of surplus furniture in the garage and in her house and we got a truck and got it and we sold it in the store.

Q. Both you and Mrs. Brown are in the store all day? A. From 8:00 until 6:00, Monday nights till 9:00. Every single day. We haven’t missed a day even though we couldn’t get up in the morning.

Q. Does that include Saturdays, too, are you open? A. Yes, sir.

Q. Where have you been having your meals there in Bakersfield during that period of time? A. Well, it might be at home, but during the day we have a stove in back of the store and Mrs. Brown fixes up a little lunch."

He further testified [Tr. p. 44, lines 7-22]:

"Q. With respect to the furniture shop that is up there in Bakersfield, do you have any salesmen in the shop apart from yourself and Mrs. Brown? A. No, sir. No salesmen whatsoever. Mrs. Brown and I do the buying, the selling, and the trading.

Q. What about advertising? Do you do any advertising up there? A. No, we can't compete with the big stores that advertise on television, radio. We just run little ads in the classified section of the paper. That's all.

Q. Do you have a delivery truck? A. No, we have the only furniture store that delivers with a little trailer hooked onto a car which we just traded for a 1952 Ford. The other was smashed up. We have a 19-year old boy that does the delivery for us. That's the only help that we have in the place."

This business eked out a net profit in 1954 of \$1,223.61, after appellant's salary of \$2,600.00 [Deft. Ex. B, Affidavit of Ralph O. Buntin].

Appellant, according to the uncontradicted testimony, had no assets during the period of probation, other than the insurance policies on which he had previously borrowed the full amount permissible, and the possible small equity in his encumbered house. Appellant always so stated during the entire period of probation [Govt. Ex. 8, Affidavit

of Jack Brown dated Oct. 23, 1951, filed Oct. 25, 1951; Govt. Ex. 7, Affidavit of Esther Brown, dated Oct. 22, 1951, filed Oct. 25, 1951; Tr. Aug. 22, 1955, p. 40, lines 3-5]. The Probation Officer said so [Govt. Ex. 7, AWB Report of March 24, 1955]. The FBI undoubtedly so concluded, for they investigated appellant's financial status [Govt. Ex. 7, MAS Report of June 2, 1952] and no Government action of any kind followed. *There is no evidence that says otherwise.*

In the course of the original sentencing, appellant, his wife, and his companies submitted their income tax returns to the scrutiny of the Court below [Govt. Ex. 8, Affidavits of Jack Brown filed Dec. 6, 1949, with attached returns; Supplemental Affidavits filed Dec. 9, 1949 and Dec. 16, 1949, with attached return]. No proceedings whatever have been started in the ensuing six years over these returns by the Federal authorities, and they remain unchallenged as true and accurate. Before appellant was released from prison on his sentence which he served on Count 6 he took the pauper's oath required by Section 3569 of Title 18 of the United States Code [Tr. Aug. 22, 1955, p. 46, lines 21-25] and no proceedings have ever been brought to attack that oath. Despite all these facts to the contrary, the Court below has always been and is now convinced that appellant somewhere, somehow, has substantial hidden assets. However, the Court below has in effect conceded that there is no *evidence* of any such concealed assets [Tr. Sept. 12, 1955, p. 19, lines 1-3]:

“The Court: He is acting out a perfect act, just like anyone who has cash salted away. *And if the Government doesn't find it* he will get away with it, too.” (Emphasis supplied.)

The Court below apparently not only believes appellant has assets concealed, but that these assets are very substantial [Tr. Sept. 12, 1955, p. 22, lines 14-23]:

“The Court: Mr. Klinger, I am thoroughly convinced that Mr. Brown can pay this fine in full and have plenty left any time he wants to do it. . . . *But it is my belief, and it is my finding that he is financially able to pay it at any time out of the resources under his control.*” (Emphasis supplied.)

At the time the Court made this statement there was \$18,500.00 due on the fine imposed as a condition of probation, and an additional \$10,000.00 on the committed fine, or a total of \$28,500.00. Thus, the Court was of the belief that appellant had hidden assets in excess of \$28,500.00—assets which scrutiny and examination by every federal agency having jurisdiction have not disclosed, the existence of which appellant denies, and which every fact in the record below contradicts.

There is no contention in the record that appellant was not diligent in attempting to get work or that appellant failed to take any jobs offered him. On the contrary, as shown above, all the evidence clearly demonstrates that appellant constantly sought work, and worked steadily whenever jobs were available to him.

Contrast this with the behaviour of a deliberately contumacious person. Appellant could have pleaded his age and health, refused to work, and lived on the charity—or legal duty—of his children to support him. Instead, appellant has tried to be a useful citizen and, with the help of his wife to earn his own living. Had he given up completely, his probation would now be over. For fighting and struggling to earn a marginal existence, he is now

serving two more years in jail and is facing another \$20,000.00 fine.

As an indication of appellant's cooperation, the uncontradicted testimony is that, on each instance that he received a letter from the United States Attorney concerning his fine, he visited the United States Attorney and discussed with him his inability to pay the fine [Tr. Aug. 22, 1955, p. 47, lines 1-24]. The United States Attorney at any time can enforce the fine by execution against a defendant's property in like manner as judgments in civil cases (18 U. S. Code 3565) and the taking of a pauper's oath does not discharge the obligation to pay the fine. *Smith v. United States*, 143 F. 2d 228, 230 (C. A. 9, 1944) cert. den. 323 U. S. 729. Yet the United States Attorney has never proceeded to enforce collection of the \$10,000.00 fine—obviously because property upon which to levy was non-existent.

Appellant always attempted in good faith to obey all the conditions of his probation [Tr. Aug. 22, 1955, p. 48, line 22, to p. 49, line 3]. He paid \$1,500.00 on the fine. He could pay no more. Not only were no directions given appellant by the Probation Office as to the times and installments of payment as required by the Court's judgment, but, as indicated above, and as the record demonstrates, he was in no position to pay, even if he had been directed. This was the attitude of the Probation Office and this was the fact. Hence, it cannot be properly said that he *wilfully* failed to pay.

Rather, it seems on all the evidence that appellant is being given an additional heavy sentence—double the original sentence—simply because he, as a matter of fact, did not pay his fine, without any real consideration of his intentions, willingness, or ability. It is well settled that a

court cannot impose an additional punishment merely for failure to pay a fine. *Chapman v. United States*, 10 F. 2d 124, 125 (C. A. 5, 1925, cert. den. 271 U. S. 667; *Vogel v. Wong*, 178 F. 2d 327, 329 (C. A. 6, 1949). In the *Chapman* case the Court imposed a fine and a sentence of imprisonment, but in default of payment of the fine, a heavier imprisonment. It was held that this was beyond the power of any court. On all the evidence, it is submitted that this is precisely the practical effect of what the Court below has sought to do in the present case.

C. Appellant Was Always Willing to Pay the Fine if He Could, and Never Expressed an Intention Not to Pay Any Part of the Fine.

Appellant contends that the Court also erred in making the finding:

“The Court further finds that in July of this year, the defendant stated that he had no intention to pay any part of the fine.” [Govt. Ex. 8, Judgment of Aug. 26, 1955.]

Appellant asserts that there is no substantial evidence to sustain this finding.

Appellant testified that he always tried to live up to the conditions of his probation [Tr. Aug. 22, 1955, p. 48, line 22, to p. 49, line 3]. There is no contention that he ever violated any of the conditions of his probation, except the one regarding the fine.

Appellant's general attitude toward the fine is illustrated by his uncontradicted testimony as to the letters he received from the United States Attorney [Tr. Aug. 22, 1955, p. 47, lines 7-24]:

“A. Every time I received one of those letters I made it my business to go up and see the writer

and tell him my true status, what position I was in.

Q. Now, you did see the writer? A. Every time, every time, I never missed one.

Q. All right. And did you— A. Excepting one, I came all the way from Bakersfield and the writer wasn't in, so I spoke to someone in the office and I explained to him what it was and he said, well, it is their duty to try and collect, and if I don't have it I just don't have it, that's all.

Q. In each instance where you discussed it with the assistant that had the matter, what was the response of that assistant when you explained your financial situation? A. Well, they just said they have their duty to perform to try and collect some money on it if there is any money available, but if I don't have it I just don't have it, that's all."

The Probation Officers visited appellant as "regularly as possible" during the four and one-half years of appellant's probation, there being nineteen personal contacts [Tr. Aug. 22, 1955, p. 22, line 19, to p. 23, line 10]. *Despite this, there is nothing in the entire Probation Office file [Govt. Ex. 7] or the Court file [Govt. Ex. 8] containing any statement that appellant was not living up to his conditions of probation, prior to July 14, 1955.*

The Government has sought to use a report of Stanley J. Algots, the Fresno Probation Officer, and Algots' confused and equivocal testimony at the hearing, as a basis for the finding set forth above. This report and testimony related to an interview Algots had with appellant on July 14, 1955, the first time that Algots had ever met appellant [Tr. Aug. 22, 1955, p. 24, lines 15-21; p. 28,

lines 18-23]. In his report, Algots stated [Govt. Ex. 7, Letter of July 22, 1955, Algots to Meador]:

“On July 14, 1955, the writer contacted Jack Brown at his wife’s furniture store, 800 Baker Street, Bakersfield, California where he states he is employed at \$50.00 per week. *The conversation was very friendly and forthright.* He related a woeful story about his conviction and why he should never have been prosecuted.

“When questioned regarding his failure to make payments on the fine, subject stated that he had no intention of paying the fine and that it would be impossible for the Government to collect anything when he has no real assets.

“It is suggested that you review this case with Mr. Arthur Brink, United States Probation Officer, the previous supervising officer.” (Emphasis supplied.)

Algots’ testimony concerning this interview and appellant’s statements appear at pages 24-32 of the Transcript of August 22, 1955. He testified that he did not remember appellant’s exact words [See, Tr. Aug. 22, 1955, p. 27, lines 1-7; p. 29, lines 2-6]. Algots finally stated that his best recollection was, not that appellant said he did not “intend” to pay the fine as Algots had said in his written report, but that appellant said he was not going to pay the fine [Tr. Aug. 22, 1955, p. 32, lines 3-13]. Algots testified that appellant followed this with the explanation that he had no assets with which to pay it [Tr. Aug. 22, 1955, p. 27, lines 15-20; p. 30, lines 14-20]. Appellant himself testified that he had never stated that he did not “intend” to pay the fine, but that he was not in a position to pay it because he had no money [Tr. Aug. 22, 1955, p. 38, line 20, to p. 39, line 8].

Algots agreed that appellant had said he was not able to pay the fine [Tr. Aug. 22, 1955, p. 30, lines 14-20].

Hence, the testimony is uncontradicted that appellant said at the interview that he had no assets with which to pay the fine. As previously pointed out, the evidence is also uncontradicted that appellant actually had no assets. The whole question then is whether or not a man who is unable to pay and says that he is not going to pay means that he is not going to pay because he is unable to pay or because he is unwilling to pay, even if he could. This esoteric point is made even more so by the fact that the Probation Officer himself is not clear as to exactly what words were used—and finally decided “intend” was not used—so that any conclusions he drew represent solely his feelings as to the attitude of a probationer he has never seen before. Further, they represent a feeling not expressed anywhere else in the files of the Probation Office or the Court at any time prior thereto by either the United States Attorney or any of the probation officers that had dealt with appellant during the preceding four and one-half years.

Moreover, appellant’s testimony that he told Algots he was not paying the fine because he was unable to do so is far more consistent with the “friendly and forthright” nature of his interview with Algots than any blunt or belligerent declaration by appellant that he did not intend to pay the fine regardless of his ability to do so as the Court’s finding implies.

The uncertain recollection of a probation officer, seeing appellant for the first time, in the face of four and one-half years of probation without complaint and without any hint or suggestion of violation, and appellant’s uncontradicted lack of assets, is far short of the substantial

evidence needed to sustain a finding that appellant stated that he had no intention of paying any part of the fine, irrespective of his ability to pay. Certainly it is a wholly insufficient basis upon which to predicate the revocation of appellant's probation.

D. The Court Abused Its Discretion in Revoking Appellant's Probation.

Appellant contends that the termination of appellant's probation on the basis of findings unsupported by any substantial evidence was an abuse of the Court's discretion, and further, that the entire course of the proceedings and the statements made therein demonstrate that such termination was made on the basis of conjecture and suspicion.

While the Court is given the power to revoke probation by Section 3653 of Title 18, United States Code, it is well settled that this is a matter in which the Court must exercise its discretion fairly. In *Burns v. United States*, 287 U. S. 216, 222-223 (1932), Chief Justice Hughes said:

"The question, then, in the case of the revocation of probation, is not one of formal procedure either with respect to notice or specification of charges or a trial upon charges. The question is simply whether there has been an abuse of discretion, and is to be determined in accordance with familiar principles governing the exercise of judicial discretion. That exercise implies conscientious judgment, not arbitrary action. *The Styria*, 186 U. S. 1, 9. It takes account of the law and the particular circumstances of the case and 'is directed by the reason and conscience of the judge to a just result.' *Langnes v. Green*, 282 U. S. 531, 541. While probation is a matter

of grace, the probationer is entitled to fair treatment, and is not to be made the victim of whim or caprice.”

Mr. Justice Cardozo has also spoken on the subject of revocation of probation. In *Escoe v. Zerbst*, 295 U. S. 490, 493-4 (1935), in finding an attempted revocation of probation invalid, he said:

“Clearly the end and aim of an appearance before the court must be to enable an accused probationer to explain away the accusation. The charge against him may have been inspired by rumor or mistake or even downright malice. He shall have a chance to say his say before the word of his pursuers is received to his undoing. This does not mean that he may insist upon a trial in any strict or formal sense. *Burns v. United States*, *supra*, at pp. 222, 223. It does mean that there shall be an inquiry so fitted in its range to the needs of the occasion as to justify the conclusion that discretion has not been abused by the failure of the inquisitor to carry the probe deeper. *Burns v. United States*, *supra*. That much is necessary, or so the Congress must have thought, to protect the individual against malice or oppression. Almost equally it is necessary, if we read aright the thought of Congress, for the good of the probation system with all its hopes of social betterment.”

And Mr. Justice Cardozo went on to say (295 U. S. 490, 494):

“Judgment ceases to be judicial if there is condemnation in advance of trial.”

Retribution is not the dominant objective of criminal law nor is vengeance the motivation for public prosecution.

Williams v. New York, 337 U. S. 241, 248 (1948);
Morissette v. United States, 342 U. S. 246, 251 (1952).

This Circuit has also stated that probation may not be revoked except for cause. (*Kirk v. United States*, 185 F. 2d 185, 187 (C. A. 9, 1950).)

Just what the "discretion" of the Court means has been concisely set forth in *Langnes v. Green*, 282 U. S. 531, 541 (1931):

"The term 'discretion' denotes the absence of a hard and fast rule. *The Styria v. Morgan*, 186 U. S. 1, 9. When invoked as a guide to judicial action it means a sound discretion, that is to say, a discretion exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result."

In *Hollandsworth v. United States*, 34 F. 2d 423, 428 (C. A. 4, 1929), the Court said:

". . . In view of these several provisions of the act, it seems to be clear that, if the probationer complies with the condition of his probation, he is entitled to remain on probation, subject to the supervision of the court and its officers, until the maximum period of sentence expires, and is then entitled to a final discharge. The power of the court to revoke a probation and sentence the probationer may not be exercised unless it is made to appear that he has failed to comply with the terms and conditions prescribed for him. It is not conceivable that Congress intended to confer upon the court the power to call back the defendant at any time within five years after conviction and imprison him, no matter how blameless his conduct may have been during the interim, or how strictly he may have observed the terms of his probation . . ."

See, also, *United States v. Koppelman*, 61 Fed. Supp. 1007, 1009 (M. D. Pa., 1945), where the Court said that in a probation revocation hearing doubts engendered by either the proof or the absence of it must be resolved in favor of the defendant.

Applying these principles, Courts of Appeals have had occasion to reverse revocations of probations entered by various lower courts. Thus, in *United States v. Van Riper*, 99 F. 2d 816 (C. A. 2, 1938), after a complete review of the evidence, the Court held that extensive and complicated counseling and advising of aliens as to obtaining citizenship did not justify a lower court revocation of probation imposed on immigration and naturalization charges. The Court pointed out that the conclusions on which the court acts must be based upon "relevant proven facts," and that the decision must not rest upon "whim or caprice or suspicion of misconduct not proven" (99 F. 2d 819).

The most recent case, and one analogous to the instant case, is *Hamilton v. United States*, 219 F. 2d 364, 366-367 (C. A. 10, 1955). Hamilton and one, Day, were placed on probation for income tax violations. While on probation, Hamilton owned and ran a drug store of his own in one town, and had a 51% interest in another drug store in a different town, managed entirely by Day. The Day-managed store was charged with selling drugs without prescriptions, and both Day and the store pleaded guilty. Because of this, Hamilton's probation in the income tax proceedings was revoked, on the sole grounds that he had a 51% interest in the offending store. The evidence was that Hamilton had no part in the management of the offending store, that he spent all his time in

a different city running his own store, and that he had relied on the monthly reports of an auditor as to the operations of the offending store. On the basis of this record, the Court of Appeals vacated the order revoking probation, and vacated and set aside the sentence imposed, stating that the trial court had exercised considerable feeling in the matter, and concluding that the revocation "cannot be considered by this court in any other light than as arbitrary and an abuse of judicial discretion." (219 F. 2d 367.)

Appellant contends that the lack of substantial evidence to support any of the findings of the Court below clearly shows that the Court acted in excess of its discretion in revoking appellant's probation. As Chief Justice Hughes stated (287 U. S. 216, 223):

"While probation is a matter of grace, the probationer is entitled to fair treatment, and is not to be made the victim of whim or caprice."

This language is particularly significant here when it is recalled that we have here the situation of a man who has struggled to earn a living and who had no intimation he was not living up to the terms of his probation until his probation was substantially over. In reviewing the entire proceedings, it is apparent that the termination and revocation of his probation and the two maximum sentences appellant has received, were motivated, in major part, by the feeling of the Court below that it would be simply impossible—"it defies my belief" [Tr. Sept. 12, 1955, p. 19, lines 4, 14-15]—for a person who was violating priority regulations in 1946 and doing the volume of business that appellant was doing, not to have made and retained a very substantial profit. *The Court below has throughout expressed its fixed belief, despite the total*

absence of any evidence whatever, that appellant always had and still has a substantial amount of property "salted away" [Tr. Sept. 12, 1955, p. 20, line 3].

There has never been any evidence offered at any time that appellant had or now has any concealed assets or any property "salted away." Nor has the Government ever stated or argued in Court that such is the case.

At the hearing on revocation of probation, the Court below still retained the notion of concealed assets by appellant, although no evidence or argument was offered thereon, stating [Tr. Aug. 22, 1955, p. 89, lines 3-14]:

"The Court: As I said here before, it defies reason that men operate illegally on a cash basis, being able to charge as you could in those days, virtually anything you wanted to—

The Defendant: Your Honor, please—

The Court: —and not have anything come out of it to you.

The Defendant: If your Honor please, may I say something?

The Court: I have expressed that before.

The Defendant: Yes.

The Court: —and you know what my views are on it."

During the argument on the revocation of probation—not in the argument on the sentence to be imposed—the Court below again showed its belief which it apparently held since the original proceeding in 1949 by discussing and reading at length from a memorandum filed by the Government in 1950 concerning appellant's alleged profits during 1946 [Tr. Aug. 22, 1955, p. 62, lines 21-24; p. 63, line 25 to p. 65, line 13].

At the hearing on the motion for bail pending appeal on September 12, 1955, the Court again reiterated its belief that appellant had "salted away" property and that appellant, in the Court's opinion, was in a position not only to make payments on the fine, but to pay the fine in its entirety. The Transcript reads [Tr. Sept. 12, 1955, p. 18, lines 5-20]:

"Mr. Klinger: There was never any program set up in this particular case for the payment of the fine.

The Court: How do you set up a program for a man who takes in \$2,000,000 in the last two quarters of the year in which he did business, cash under the table, in black market operations, and tells you he doesn't have anything. How are you going to set up a program for him?

Now, obviously, the probation officer didn't believe him. I don't believe him, either. Now, if you can get the Court of Appeals to overrule that, reverse that decision, why, that is one thing. But I believe that Jack Brown has salted away—in the language of the street—that money, and he is doing everything he can, waiting until the time passes so that the five years is up; and if the probation officer neglected the matter another six months before coming in on the matter and reporting it to the court, he might have gotten away with it."

The Court further said [Tr. Sept. 12, 1955, p. 19, lines 1-16]:

"The Court: He is acting out a perfect act, just like anyone who has cash salted away. And if the Government doesn't find it he will get away with it, too. It defies my belief—and you may be able to get judges to say I am clearly erroneous—but it defies my belief that a man will do \$2,000,000 worth of

illegal business, not lawful business but illegal business during a time when you couldn't even keep—if you had a stick of lumber there were dozens of people ready to buy it, and apparently plenty of them willing to pay any price you asked for, and he does \$2,000,000 worth of business—cash, not credit—in six months' time; and how much he did the preceding six months I don't know, but something comparable to it, a million dollars a quarter in cash, and he didn't come out with any of it. It just defies my belief of a man who knowingly is doing an unlawful business—and whatever you may say of defendant Brown, he wasn't stupid—”

As previously pointed out, the Court's statement here inferentially concedes that there is no *evidence* of any concealed assets.

The Court also said [Tr. Sept. 12, 1955, p. 20, lines 2-6]:

“The Court: \$2,000,000 cash business is not a bubble, Mr. Klinger. It might be salted away somewhere—in the language of the street—in the earth or some well, waiting for the propitious time to dig it up; or it may be distributed among members of the family in some convenient way.”

The Court concluded [Tr. Sept. 12, 1955, p. 22, lines 14-23]:

“The Court: Mr. Klinger, I am thoroughly convinced that Mr. Brown can pay this fine in full and have plenty left any time he wants to do it. Of course, I don't have to make that finding in order to revoke his probation. If I find he can pay anything on it, in good faith and should have done it, and was notified to and requested to do it and didn't do it, that is all that is necessary. But it is my belief, and it is my finding that he is financially able to pay it at any time out of the resources under his control.”

How divorced the Court's impressions are from the evidence is indicated by the attitude throughout of the United States Attorney, who was, of course, familiar with all the facts. The United States Attorney *never* at any time in the case recommended imprisonment. Even after the Court had sentenced appellant originally to one year's imprisonment, the United States Attorney stated that the Government "would not object to a reduction in the jail sentence to three months or admission of the defendant to probation if the Court feels that is a proper sentence" [Tr. Jan. 13, 1950, p. 11, lines 6-10]. The highest fine ever recommended by the Government was one-half that imposed by the Court [Tr. Nov. 16, 1949, p. 46, lines 9-10]. After appellant had been on probation for a year and a half, the Government stated that it "has no objection to terminating probation and reducing fine" [Govt. Ex. 8, Minutes of Court, Sept. 10, 1951]. The Government's attitude is probably due to its apparent belief that appellant did not end up with a profit as the result of his overall operations, the Government having conceded [Tr. Jan. 13, 1950, p. 3, lines 9-12]:

"It may well be true that in the years 1946, '47 and '48, during the time when Brown and his associates were in business, looking at all of the transactions of all of the corporations, they came out with less than they started with." (Emphasis supplied.)

From this it appears that the United States Attorney, the Probation Office, the evidence, and the appellant, all agree in pointing to the fact that appellant has no assets hidden away. The Court below alone apparently believes otherwise and has acted accordingly. This belief—unsupported—held by Court from the outset, is, we submit, the real basis of the revocation of appellant's probation. This

certainly is "an abuse of judicial discretion" as the Court stated it in reversing the revocation of probation in *Hamilton v. United States*, 219 F. 2d 364, 367, and not one based upon "relevant proven facts."

E. The Letters to Appellant From the United States Attorney Were Improperly Admitted for the Probationary Order Authorized Only the Probation Officer to Give Directions Respecting Payment of the Fine.

Appellant further contends that the admission by the Court of the letters of the United States Attorney to appellant [Govt. Exs. 1-6] was improper. Appellant made seasonable objection at the time the letters were offered [Tr. Aug. 22, 1955, p. 3, line 16, to p. 4, line 7; p. 7, lines 7-8; p. 10, lines 6-10].

The issue before the Court to which these letters were addressed was whether directions had been issued to appellant by the Probation Office which he had failed to heed. The letters in question on their face were from the United States Attorney, and not from the Probation Office. While there was testimony that the Probation Office and the United States Attorney "cooperated" in the collection of fines [Tr. Aug. 22, 1955, p. 8, line 24, to p. 9, line 8], the Chief Probation Officer testified that the United States attorney is not authorized on behalf of the Probation Office to fix the terms and conditions of probation insofar as they relate to the payment of fines [Tr. Aug. 22, 1955, p. 7, lines 15-18]. This is obviously so, for probation is supervised by the United States Probation Office as an arm of the Court, whereas the United States Attorney is an arm of the executive.

Further, the uncontradicted evidence is that appellant was never informed or told that the letters he received from the United States Attorney allegedly represented communications for or on behalf of the Probation Officer [Tr. Aug. 22, 1955, p. 50, lines 18-24]. It matters not that the Probation Officer may have talked to the United States Attorney before some of the letters were sent [Tr. Aug. 22, 1955, p. 7, line 19 to p. 8, line 9]. Neither the United States Attorney, the Probation Officer, nor the letters themselves, stated or even implied they were from the Probation Officer. A defendant cannot be found guilty, as here, pursuant to an alleged delegation of authority kept secret from him.

It thus is clear that the Court erred in admitting these letters over objection of appellant.

Conclusion.

Appellant was charged in the last four months of this five year probationary period with violation of a condition of probation that he pay a fine "at such times and in such installments as the Probation Officer . . . shall direct." No such directions were given. There is no evidence of any suggestion by anyone before then to him or to the Court that appellant was violating any condition of his probation. There was no change whatever in appellant's circumstances or conduct in these last four months. Only the confused testimony of a single probation officer out of all those who dealt with appellant during more than four and one-half years is relied upon to show appellant's alleged attitude in a hypothetical situation—whether appellant would pay if he should by chance have money, which he did not have.

Appellant, as a result of the two sentences, is condemned to three years imprisonment and fines totaling \$30,000.00. This, despite the indications of the United States Attorney at various times in the proceedings that to him no imprisonment was necessary and that a fine one-half the amount imposed would be enough. This maximum imprisonment and fine appear from the evidence to have been imposed solely because the Court below, contrary to the evidence and the representations of counsel for both the Government and the appellant, believes that appellant has large amounts of concealed assets.

Because appellant was unable—not unwilling—to pay the \$30,000.00 fine when it was originally imposed, he must now spend two more years in prison. While these two years are clothed as the imposition of sentence on revocation of probation on counts as to which the original imposition of sentence was suspended, in fact they are a sentence imposed for the failure of a man to pay a fine that his circumstances in life did not permit him to pay.

The facts and arguments outlined in appellant's brief establish that there is no substantial evidence to support the findings of the Court on which the revocation of probation is based, and further indicate that such revocation was an abuse of the Court's discretion. Appellant therefore prays that this Court set aside the order of the Court below revoking and terminating appellant's probation and vacate and set aside the sentence imposed.

Respectfully submitted,

TOBIAS G. KLINGER,

Attorney for Appellant.

No. 14885.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JACK BROWN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

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PAUL P. O'BRIEN, CLERK



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No. 14885.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JACK BROWN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

I.

STATEMENT OF JURISDICTION.

A seventeen count indictment was filed against appellant on April 27, 1949, charging conspiracy, false representations within the jurisdiction of a federal agency and priorities violations in beginning construction and diverting materials.

Appellant entered a plea of *nolo contendere* to Counts Six, Seven and Eight, three misdemeanor counts in the indictment alleging violations of Section 633 of Title 40, Appendix, United States Code, and on November 16, 1949 the Honorable William C. Mathes of the United States District Court for the Southern District of California, sentenced appellant to imprisonment for one year and to pay a fine of \$10,000.00 on one count, suspended

the imposition of sentence on the other two counts, and placed appellant on probation for five years after his release from custody, on condition that he pay a fine of \$20,000.00 [Govt. Ex. 8, Judgment of Nov. 16, 1949]. By Judgment entered on August 26, 1955, the same Court revoked and terminated its prior probationary order, pursuant to Section 3653 of Title 18 of the United States Code, and sentenced appellant to two years imprisonment and to pay a fine of \$20,000.00 [Govt. Ex. 8, Judgment of Aug. 26, 1955].

On August 31, 1955, appellant filed his Notice of Appeal to this Court from the Judgment of August 26, 1955, pursuant to Section 1291 of Title 28 of the United States Code [R. p. 2].

II.

STATEMENT OF THE FACTS.

During the era of intense shortage of housing and of building materiel which existed in this country in 1946, immediately subsequent to the cessation of hostilities in World War II, appellant engaged in an enormously large business involving the sale, principally to non-veterans, of prefabricated houses for cash. These houses contained materials obtained by appellant upon an H H priority, upon the fraudulent representation to the Government that the critical materials thus obtained would be incorporated into prefabricated houses and sold to veterans only [Govt. Ex. 8, especially Counts 6, 7 and 8 of the Indictment filed April 27, 1949, and Memorandum Regarding Profit from Federal Housing Administration Violations, filed October 5, 1949].

III.

STATEMENT OF THE CASE.

On April 27, 1949, appellant was indicted for alleged conspiracy, false representations within the jurisdiction of a federal agency and priorities violations in beginning construction and diverting materials.

Appellant entered a plea of *nolo contendere* to Counts Six, Seven and Eight of the indictment on September 8, 1949.

Count Six charged appellant with wilfully beginning construction of a prefabricated house although appellant knew such construction was not authorized under appropriate Veterans' Housing and Priority Regulations.

Counts Seven and Eight each charged appellant with wilfully selling to a non-veteran, a prefabricated house into which house were incorporated certain plumbing supplies and materials which appellant obtained by use of H H priority ratings.

On November 16, 1949, the Court committed appellant, on Count Six to the custody of the Attorney General for one year and imposed a fine of \$10,000.00, with appellant to stand committed until the fine was paid. On Counts Seven and Eight, the Court suspended imposition of sentence and placed appellant on probation for a period of five years commencing upon his release from custody from the imprisonment imposed under Count Six. One of the conditions of probation was that during the probationary period, appellant "pay to the United States of America a fine of \$20,000.00, such fine to be paid at such times and in such installments as the Probation Officer of this Court shall direct" [Govt. Ex. 8, Judgment of Nov. 16, 1949].

On January 13, 1950, the motion of appellant for reduction of sentence was denied [Tr. Jan. 13, 1950, p. 34, lines 16-25].

Appellant was released from prison on November 15, 1950.

By Order of December 12, 1951, filed December 13, 1951, the Court denied without prejudice the petition of appellant to terminate probation and to remit the fine.

A petition for revocation and termination of appellant's probation was filed on July 22, 1955 and after a one day hearing on August 22, 1955, the Court entered its judgment on August 26, 1955, revoking and terminating the probationary order and sentencing appellant to imprisonment for one year and a \$10,000.00 fine on each of Counts Seven and Eight, to run consecutively, or a total imprisonment of two years and a \$20,000.00 fine, appellant to stand committed until the fine be paid or he otherwise be discharged as provided by law [Govt. Ex. 8, Judgment of Aug. 26, 1955].

On August 31, 1955, appellant filed his Notice of Appeal to this Court from the Judgment of August 26, 1955 [Govt. Ex. 8].

On September 12, 1955, this Court heard and denied appellant's motion for bail pending appeal.

IV.

ARGUMENT.

A. The Court Ordered Appellant to Pay to the United States of America, a Fine of \$20,000.00 With Power in the Probation Department to State the Times and Installments. The Probation Department Directed Appellant Concerning Times of Payment and Installments.

The Court ordered appellant to “pay to the United States of America a fine of \$20,000.00. . . .” The entire sum became due on the date of judgment on November 16, 1949 and appellant having wilfully failed to make payments on the fine during the period of probation while having the ability to pay, violated a condition of probation. Appellant cites no authority in support of his contention that the \$20,000.00 fine did not become due immediately.

It was within the power of the Probation Department to ameliorate the requirement that all of the fine be paid immediately, by granting to appellant the grace of payment “at such times and in such installments” as the Probation Officer shall direct.

For the purpose of argument, we do not concede but will assume that the \$20,000.00 fine would not have become due unless times of payment thereon and installments had been designated by the Probation Department. There was substantial direction to appellant by the Probation Department in this regard from 1950 until revocation of probation proceedings in 1955.

Probation officer Paul O. George [Tr. Aug. 22, 1955, p. 11, lines 13-15, incl.] discussed “the \$20,000.00 fine” with appellant as early as November 20, 1950, and, “tried

to impress upon him the importance of making payments on the fine." [Govt. Ex. 7, typed on blue paper on the left side of said exhibit].

According to appellant's own testimony, every time appellant saw Probation Officer Smith, Officer Smith told appellant that if appellant could make some payment he should do so, that whenever he had any money, he should make regular payments of the fine, however, small they may be.

The specific testimony is as follows:

"Q. (By Counsel for Appellant): There is a reference in one of the reports, I believe by Mr. Smith, that on one of your office visits there was discussion about your trying to make some regular payments, however small they may be. Do you recall a discussion of that kind? A. Yes. [Tr. Aug. 22, 1955, p. 48, lines 5-10, incl.].

Q. (By Counsel for the Government): When was this conversation that occurred between yourself and Mr. Smith during which it was said that if you could make some payment you should make some payment? When did that conversation occur? Can you recall the year? A. I think every time I saw Mr. Smith he referred to that. I saw him a few times.

Q. Has that been since 1952? A. I can't say the exact year or month it was, but I saw him a few times, and he said whenever I had any money to make some payment on it."

The Probation File, Government's Exhibit 7, typed on the left side thereof on blue paper, indicates that Probation Officer Smith consulted with appellant on twelve different occasions, including twice in 1953, and that

other probation officers consulted with appellant during the period of probation.

Chief Probation Officer Calvin H. Meador testified:

“ . . . There was never any definite amount set for Mr. Brown to pay. The reason no definite amount was set is that on each occasion a representative of the probation office or I myself talked with Mr. Brown concerning the fine. He was highly insistent that he had nothing with which to pay and, as a result, we merely instructed him to make payments regularly by the month as — — in as great an amount as possible.” [Tr. Aug. 22, 1955, p. 9, lines 13-20, incl.]

Appellant himself, testified that he understood the payments should be made in the sum of “at least a hundred dollars”:

“A. Well, Mr. Smith said that if I could make some payment to reduce the fine I should do it, but there was no apecific (specific) amount involved as to \$5 or a dollar or \$10. I thought that would be an insult to the government on a \$30,000 fine to come up with a dollar or \$5. He just said if I have any, make any money, have any money, I should bring up some money towards the fine. *I figured the lowest I could bring up against a fine of that kind would be at least a hundred dollars, not a dollar or five dollars.*” (Emphasis added.) [Tr. Aug. 22, 1955, p. 48, lines 13-21, incl.].

The Probation Department directed appellant to make monthly payments on the fine in as great an amount as possible; to make regular payments on the fine, however small they may be. The “times” specified in the order were “monthly”; the “installments” were most liberal,

i. e., anything the appellant could pay "in as great an amount as possible," which was purportedly understood by appellant to mean \$100 or more.

B. Appellant Was Financially Able to Pay and Wilfully Failed to Make Payments on the Fine.

In the monthly probation reports made by appellant to the Probation Department, appellant stated his income to be \$1000 for the month preceeding the Report dated January 4, 1952 [Govt. Ex. 7 and Tr. Aug. 22, 1955, p. 13, line 18 and p. 14, lines 8-11, incl.] and \$500 monthly for the next four months [Govt. Ex. 7 and Tr. Aug. 22, 1955, p. 15]. None of this income was paid toward the fine and at least \$440.79 was not applied toward necessities of life, as follows:

The March 1, 1952 probation report indicates appellant paid \$143 to the Metropolitan Life Insurance Company, the April 10, 1952 report indicates \$140 was paid for life insurance and the May 3, 1952 report indicates \$157.79 was paid to Metropolitan Life Insurance Company.

Appellant had borrowed \$5,000.00 on his life insurance policies seven or eight years ago [Tr. Aug. 22, 1955, p. 55, lines 23-25 incl., p. 56, line 1].

Since that time to the date of revocation of his probation, he paid \$300 a year, at six per cent interest on the insurance loan, without fail [Tr. Aug. 22, 1955, p. 56, lines 2-14 incl.] and \$320 a year as premiums on the policies [Tr. Aug. 22, 1955, p. 57, lines 3-5 incl.] or a total yearly payment to the insurance company of \$620 every year that appellant was on probation. It is submitted that appellant could have paid on the fine to the

Government, the entire sum of approximately three thousand dollars which he paid to the insurance company during the almost five years he was on probation, or could have paid to the Government "at least a hundred dollars" which appellant alleges was his understanding of the minimal acceptable payment on the fine. Instead, appellant chose to pay the insurance company and thereby plan to leave an estate and at the same time evade payment of the fine.

After the aforesaid employment, appellant was employed by the National Cabinet Company for a period and then, for almost two years, from approximately August or September of 1953 to the date of revocation of probation, appellant was steadily employed for an alleged sum of only \$200 per month by the National Furniture Company which company is allegedly owned solely by the wife of appellant. With a steady modest income every month for two years, it is not reasonable to believe that appellant or anyone would be unable to pay something on the fine.

Appellant's income as reported by him to the Probation Department was \$200 per month. According to appellant's own witness, Ralph O. Buntin, Public Accountant for the National Furniture Company, as stated in the third paragraph of the first page of his affidavit [App. Ex. B]:

" . . . all personal expenses such as medical, insurance, insurance loan payments, house payments, and similar items pertaining to both Jack Brown and Esther Brown are paid by the National Furniture Company and charged to Mrs. Brown's personal drawing account;"

As all of the personal expenses of appellant were paid by the National Furniture Company, appellant's actual income was greater than reported and some or all of the appellant's reported \$200.00 per month earnings from employment could easily have been applied on the fine.

Page three of appellant's Exhibit B is a balance sheet for the National Furniture Company. The bottom of the page contains a condensed statement of profit and loss for the 12 months ended December 31, 1954. Net sales were in excess of \$42,000; gross profit and other income total \$19,027.51. Expenses are stated to total \$17,803.90 and include salaries, interest, taxes, rent, advertising, other expenses and depreciation. The largest item is "Other Expenses" which is \$6,170.83. These "Other Expenses" are, of course, the personal expenses of appellant and his wife such as house payments, which are paid by the National Furniture Company as the business expense discussed *supra*. In addition to the payment of appellant's personal expenses by the National Furniture Company, salaries were paid by the company in the total sum of \$6,042.60 which is stated to include \$2,600.00 to Jack Brown. According to appellant, the only help they have in the place is a nineteen year old boy who does the delivery for them [Tr. Aug. 22, 1955, p. 44, lines 20-22 incl.] The difference between \$2,600.00 and \$6,042.00, the sum of \$3,442.60, must be the salary paid to the delivery boy for 1954. If the probation reports state the only income to appellant, the incongruous conclusion would be reached that appellant with his managerial background and years of experience [Govt. Ex. 8 and Affidavits of appellant therein] managed the business allegedly owned by his wife for less than the salary paid to the nineteen year old delivery boy.

Upon the apparently warranted assumption that; (1) most of the \$6,170.83 of "Other Expenses" was used to pay the personal expenses of appellant and his wife, (2) that appellant also received a \$2,600 salary, and (3) the alleged net profit to appellant's wife was \$1,223.61, appellant and his wife received an income in the vicinity of almost ten thousand dollars for the year 1954.

During the probationary period, appellant also received \$7,500.00 from his three children and returned \$500.00 to one child who needed it.

Appellant had the financial ability to have paid something on the fine since June 20, 1951.

C. Appellant Stated He Did Not Intend to Pay the Fine, and Did in Fact Never Intend to Pay the Fine.

Probation Department Officer Stanley Algots testified that on July 14, 1955, the appellant stated to Algots that he, appellant, was not going to pay the fine because he was unwilling to pay it. Excerpts of the pertinent testimony of Mr. Algots are as follows:

Mr. Algot:

"I asked him what was going to be done about the fine and *Mr. Brown told me that he was not going to pay the fine, and then he went on again about the treatment he had received.*" [Tr. Aug. 22, 1955, p. 26, lines 13-16 incl.] (Emphasis added.)

"*Later on he went on to me that he had no money or no assets with which to do it, that the Government couldn't collect.*" [Tr. Aug. 22, 1955, p. 26, lines 18-21 incl.] (Emphasis added.)

"*Following the statement that he was not going to pay the fine, he went into another story slightly*

sidetracked on how, *what a tough deal he had received all along the line*. Then he told me that it would be impossible for the government to collect the money from him in that he had nothing. . . .” [Tr. Aug. 22, 1955, p. 27, lines 15-20]. (Emphasis added.)

“The Court: Do you intend to convey to us that he said he wasn’t going to pay it because he was unwilling to pay it, is that what you intend to convey to us?”

The Witness: Yes, sir.

The Court: That is what you understood him to say?

The Witness: That is what I understood him to say.” [Tr. Aug. 22, 1955, p. 30, lines 8-13.]

Appellant did not pay any portion of the fine voluntarily. He believed that he was being persecuted. He informed the Court that there were others worse than he who had not been prosecuted. This is the reason for appellant’s wilful failure to pay on the fine. He simply decided that his term of imprisonment was more than sufficient punishment for the offense and that he would make no voluntary payment on the fine.

Appellant commenced his probationary period on November 15, 1950. No payment was made on the fine until June 20, 1951, at which time he paid \$1,500 on the fine. This was the only payment ever made on the entire fine of \$30,000.00 and was made by appellant to obtain a release of the Government’s lien against the joint tenancy property of appellant and his wife. Appellant contended the property, which had an acquisition cost of \$23,000.00, was the separate property of his wife, not subject to the fine. He paid the \$1,500 so that upon a sale of the prop-

erty he would avoid loss of the proceeds therefrom to satisfy the Government lien. It was not unreasonable for the Government to release its lien where several years remained for payment on the balance of the fine.

The admitted income of appellant, \$1,000 one month, \$500 many months and \$200 a large portion of the probationary period enabled appellant to have paid on the fine if he intended and wanted to pay on the fine.

At all times appellant paid his insurance company \$620.00 per year, yet at no time did he make any payment on the fine except the one payment made to obtain a release of lien.

If appellant intended to pay on the fine he could have evidenced it by regular payments or intermittent payments on the fine, instead of paying \$620.00 every year to his insurance company with the certainty that no portion of the payments or prospective pecuniary benefits to be derived would be applied on the fine and add to his "persecution."

To avoid the necessity of a second purported metamorphosis from apparent joint tenancy property into alleged separate property of his wife, appellant did not share in the record ownership of the National Furniture Company. He managed it instead. This further evidences his intention to avoid payment of the fine by avoiding acquisition of property which would be subject to the fine.

Appellant stated he did not intend to pay the fine. His failure to pay on the fine speaks more clearly than his words that his intention was to never pay anything on the fine if he could avoid it.

D. The Trial Court Acted Within Its Discretion in Revoking Appellant's Probation.

Appellant's Opening Brief on page 43 prior to the "Conclusion," with reference to the revocation proceedings, states in part:

" . . . defendant cannot be found guilty,"

It is respectfully submitted that defendant was not found guilty in the revocation of probation proceedings. A hearing on a charge of probation violation is in the nature of a summary proceeding, and is not a "criminal prosecution."

United States v. Hollien, 105 F. Supp. 987 (D.C., Mich., 1952).

The only question on appeal from an order revoking probation is whether there has been an abuse of discretion. A breach of good faith is sufficient to warrant revocation of probation.

Burns v. United States, 287 U. S. 216, 222.

The Court did not abuse its discretion in revoking the probation of appellant Jack Brown.

Every time appellant complained vehemently of his alleged "persecution" he evidenced his lack of good faith. Having the ability to make payments, he evidenced his intention to disobey the order of Court by wilfully refusing and failing to pay anything on the fine, although repeatedly requested to do so. Appellant has never had a good faith intention to attempt to comply with the terms of probation by payment of any portion of the fine. The test is not whether or not the penalty was harsh but whether appellant in good faith attempted to comply with

the order of Court. Appellant arbitrarily decided that his term of imprisonment was more of a sentence than he had anticipated by entering a plea of *nolo contendere* and that he would pay no part of the fine, except to release the lien, although he at all times had the ability to pay on the fine. Not even one small payment clouds the window through which we clearly perceive his attitude concerning payment of the fine and his patent lack of good faith with the Court.

Appellant states on page 37 of his opening brief that he had no intimation that he was not living up to the terms of probation until it was substantially over. No notice is required, but every written and oral communication between appellant and the Government reminded appellant of the fine, his failure to pay anything on it, and directed appellant to make payments on the fine.

The Court properly revoked probation where defendant was arrears in making monthly payments on the fine.

Parks v. United States, 46 F. 2d 461 (C. C. A. Pa. 1931).

Appellant acted in bad faith and wilfully failed to pay monthly on the fine as directed, while having the ability to do so. The Court did not abuse its discretion in revoking probation.

E. The Letters to Appellant From the United States Attorney Were Properly Admitted.

Chief Probation Officer Calvin H. Meador testified that the letters [Govt. Exs. 1-6 incl.] were sent to appellant on behalf of the Probation Department [Tr. Aug. 22, 1955, p. 6, lines 20-22 incl., p. 7, line 4]. The Probation Office and the United States Attorney "cooperated" in

the collection of the fines [Tr. Aug. 22, 1955, p. 8, lines 24-25; p. 9, line 1]. Of course the United States Attorney is not authorized to fix the terms and conditions of probation. The letters were properly admitted into evidence. Appellant responded to the letters by consulting personally with members of the staff of the United States Attorney concerning the fine. Yet, despite having the financial ability to pay on the fine and despite the repeated requests of the various Probation Officers who interviewed appellant repeatedly during the probationary period directing that some monthly payment be made in some amount, appellant wilfully failed to make payments on the fine.

Appellant showed a lack of good faith by falsely informing the United States Attorney when discussing the fine in response to the letters, that he, appellant, did not have the ability to pay on the fine [Tr. Aug. 22, 1955, p. 47].

If the letters were not properly admissible to show appellant's lack of good faith or for a related reason, the admission of the letters was harmless error.

V.

CONCLUSION.

Appellant did not attempt in good faith to comply with the conditions of probation.

The Court ordered him to pay a fine to the United States. For nearly five years appellant was interviewed periodically, nineteen times in all, by probation officers who directed appellant to pay installments in whatever sum he was able to pay every month on the fine. The six letters from the United States Attorney on behalf of the

probation officer, directed that small regular monthly payments be made on the fine in as large an amount as appellant could pay. Appellant also discussed payment of the fine with the United States Attorney subsequent to receipt of each letter. Yet appellant would have this Court believe that he was never directed as to times and installments for payment of the fine. Appellant now alleges the technical defense that he did not know and the Probation Department did not tell him when and how much he should pay on the fine. Although appellant was in fact directed by the Probation Department as to times (monthly) and installments (as much as he could pay or "at least one hundred dollars"), the test is not whether he was so directed but whether he acted in good faith. If appellant entertained any doubt concerning the monthly sum which the Government would have accepted in payment on the fine he showed his lack of a good faith intention to pay the fine by failing to ask if \$5 or \$10 would be an acceptable monthly payment. Most creditors would be insulted more by a total failure of the debtor to pay, than by a small good faith payment. This is especially true where, as here, no interest accrues on the debt.

In any event, appellant testified that he understood the payments should be made in the sum of "at least one hundred dollars." At all times during the period of probation, appellant paid \$620 yearly to his insurance company which sum or a hundred dollars or more thereof he had the financial ability to have applied on the fine as well as other monies within his control, discussed *supra*. Appellant having wilfully failed to make payments on the fine during the probationary period cannot now be heard to complain of a revocation of his probation. Similarly, when appellant entered a *nolo contendere* plea to three of

the misdemeanor counts in the indictment, he knew what the maximum penalty might be and should not now and should not, from at least as early as the time he had served his first year of imprisonment, be heard to complain of alleged "persecution" by the Court for having received the maximum punishment prescribed by law.

Appellant contends that the maximum fine and imprisonment appear to have been imposed, and inferentially, that probation was revoked, "solely because the Court below, contrary to the evidence and representations of counsel for both the Government and appellant, believes that appellant has large amounts of concealed assets." The United States Attorney does not agree as suggested, that appellant has no assets hidden away, nor does the United States Attorney request that the fine or term of imprisonment be reduced.

It is the belief of the Court, of the Honorable William C. Mathes, that appellant engaged in an enormous illegal cash prefabricated building business during the post war critical housing shortage, and that appellant's protestations of poverty, since the incipient stages of the criminal proceedings, defies belief. The Court believes that appellant has the ability to pay the entire fine at any time from resources well concealed by appellant [Tr. Aug. 22, 1955, p. 89, lines 3-14; Tr. Sept. 12, 1955, p. 19, lines 1-16].

Revocation of probation was not based on appellant's wilful failure to pay the entire fine. Probation was revoked because the Court found that appellant "wilfully failed to make *any* payment since June 20, 1951, on the fine imposed as a condition of probation, and that defendant has at all times had the ability so to do." [Govt. Ex. 8, Judgment of Aug. 26, 1955].

Irrespective of whether appellant has or does not have the present ability to pay the entire fine, appellant wilfully failed to pay on the fine since June 20, 1951. He had the financial ability to make monthly payments in the sums of five or ten dollars, or an occasional payment in the sum of one hundred dollars, and wilfully failed to make any payment since 1951.

The grant or favor of probation which the Court had accorded appellant was properly revoked.

The Court did not abuse its discretion in revoking the probation of appellant and should be affirmed by this Court on appeal.

Respectfully submitted,

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Attorneys for Appellee.*

No. 14,895 /

IN THE

United States Court of Appeals

For the Ninth Circuit

HENRY C. SIMPSON,

Appellant,

VS.

HARLEY O. TEETS, Warden, California

State Prison, San Quentin, California,

Appellee.

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

APPELLEE'S BRIEF.

EDMUND G. BROWN,

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FILED

DEC 30 1966

PAUL F. O'BRIEN, Clerk

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No. 14,895

IN THE

**United States Court of Appeals
For the Ninth Circuit**

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Appellant,

VS.

HARLEY O. TEETS, Warden, California
State Prison, San Quentin, California,

Appellee.

**Appeal from the United States District Court for the
Northern District of California,
Southern Division.**

APPELLEE'S BRIEF.

STATEMENT OF THE CASE.

Henry C. Simpson and Clarence Simpson were jointly charged by indictment with the murder of Vivian Simpson on or about March 10, 1953. Clarence Simpson, being 13 years of age, was certified to the Juvenile Court. Defendant pleaded not guilty and not guilty by reason of insanity. After a jury trial he was found guilty of murder in the first degree, without recommendation; he was also found sane at the

time the crime was committed. The prosecutions' theory was that Henry Simpson counseled, advised and encouraged his 13 year old son, Clarence Simpson, to kill Vivian Simpson, wife of Henry and mother of Clarence; that such crime was a result of premeditation and planning over a period of time on the part of Henry, Clarence, and a 14 year old school friend of Clarence, one Jimmy Jones.

Petitioner's appeal to the California Supreme Court was automatic. The Supreme Court appointed counsel to represent petitioner on the appeal. The California Supreme Court affirmed the judgment in the case reported as *People v. Simpson*, 43 Cal. 2d 553. This opinion was handed down in October, 1954.

It was not until February, 1955, that petitioner filed a writ of habeas corpus in any court. Petitioner filed first in the California Supreme Court. While this petition was pending, he filed a writ of habeas corpus in the United States District Court for the Northern District of California, Southern Division. This petition was denied on the ground that he had not exhausted his remedies under the laws of California and that no facts were stated that would constitute a cause for relief. On February 22, the California Supreme Court denied petitioner's first application to that Court.

On Wednesday, February 23, 1955 petitioner's present counsel was appointed. On February 24, said counsel filed a petition for a writ of habeas corpus in the United States District Court, Northern District of California, Southern Division. The petition in the

District Court was tentatively denied on the ground that petitioner had not exhausted his State remedies, that he had not complied with the procedural rules governing applications for writs of habeas corpus set down by the California Supreme Court. Petitioner's attorney then filed a second petition on the same date, February 24, in the California Supreme Court. The petition was denied on the same date. Thereafter, the United States District Court granted a stay of execution pending determination of petitioner's request for a writ of certiorari. The petition for a writ of certiorari was thereafter denied by the United States Supreme Court.

On July 5, 1955, the United States District Court denied the petition on the ground that the Supreme Court of California fully and adequately considered the matters presented; that the Courts of the State of California had afforded petitioner due process of law; and that his contentions appeared to be without merit. Notice of appeal was filed on July 27, 1955, and a certificate of probable cause was granted and an order staying execution made on August 3, 1955.

SUMMARY OF ARGUMENT.

- I. The appellant has not exhausted his State remedies as is required by 28 U.S.C.A. 254.
- II. The California Supreme Court on consideration of the record and the facts within its knowledge properly disbelieved the allegations of the petition, and the United States District Court prop-

erly relied on the California Supreme Court's determination.

- III. In any event the Federal District Court properly denied the petition because the petition did not sufficiently allege facts to show that the appellant had been denied any right under the United States Constitution.

ARGUMENT.

I. THE APPELLANT HAS NOT EXHAUSTED HIS STATE REMEDIES AS IS REQUIRED BY 28 U.S.C.A. 254.

Petitioner has not complied with the California procedural rules requiring that the petitioner for a writ of habeas corpus allege with particularity the facts upon which he relies to overturn the judgment; he has thus not properly sought to invoke the corrective process of the State of California. A petitioner cannot exhaust his State remedy by the simple expedient of wilfully or negligently failing to present a proper petition in the State Court.

Petitioner's allegations are two-fold. First, he alleges the California Supreme Court was furnished with a false transcript of testimony upon which it determined the appeal, and, secondly, that the prosecutor knowingly used perjured testimony. California Courts provide remedies for both of these situations. See *In re Mooney*, 10 Cal. 2d 1; *In re Chessman*, 35 Cal. 2d 455.

The California Supreme Court has set forth procedural rules requiring specific allegations of fact to

establish a cause for relief. This rule does not require any technical preciseness; it simply requires a frank disclosure of the facts. This rule requires one who seeks to show his conviction was obtained by the prosecution's knowing use of perjured testimony or by a false record on appeal, to designate specifically the precise testimony which it is asserted was perjured or false, state in detail what the actual facts are, and name or otherwise identify the persons connected with the prosecution who knew it was perjured or false and persisted in using it, state also the circumstances establishing such person's knowledge of the fact. Likewise, this rule requires a showing of the materiality of the matter perjured or omitted from the record. Also, it requires petitioner to state the facts which establish that the petitioner did not have the opportunity to present the matters at the trial or on appeal. Stating this in another way, the rule requires an explanation of the delay in raising the matter. See *In re Swain*, 34 Cal. 2d, 300; *In re Razutis*, 35 Cal. 2d 532; *People v. Bronaugh*, 100 Cal. App. 2d 220, at 224.

The petition filed by petitioner's *attorney* in the California Supreme Court did not comply with these rules.

The allegation concerning the faulty record on appeal does not designate precisely the false testimony. Likewise, petitioner does not allege a knowing presentation of a false record on the part of the Court reporter or other persons, i.e., the petition does not identify the persons responsible for the false record.

Likewise, petitioner does not indicate the materiality of the alleged false testimony included in the record. A comparison of the allegations in the petition filed in the District Court with the California Supreme Court opinion, *People v. Simpson*, 43 Cal. 2d 553, shows that the testimony was immaterial. In order to establish a violation of due process by the presentation of a faulty record on appeal, it would appear that the testimony alleged to have been added would have to be material and prejudicial. The testimony would have to be of such a character as to have influenced the decision of the Appellate Court. No such showing has been made.

Furthermore, it is noteworthy that this question was not raised at the time the appeal was pending nor in the four months subsequent to the decision of the California Supreme Court; apparently it is a brain-child of one of petitioner's better known associates on death row.

The allegation of knowing use of perjured testimony is likewise insufficient. The allegation may be divided into two parts: Knowing use of perjured testimony of petitioner's stepson (Donald Dodge), and false testimony of certain other individuals due to intimidation by the prosecutor.

The allegation concerning false testimony by certain witnesses intimidated by the prosecutor is insufficient; the petition does not specify the precise testimony which was assertedly perjured, nor does petitioner name or otherwise identify the person connected with the prosecution who knew it was perjured

and insisted on using it. Nor is there an allegation that petitioner did not know at the trial that such testimony was perjured, or that he lacked the opportunity to present these matters at the trial. Likewise, there is no explanation for petitioner's delay in raising this question.

The allegation that petitioner's stepson's testimony was perjured at the solicitation of the prosecutor is likewise insufficient. First, the petition does not allege such testimony was perjured or that the prosecutor knew it was perjured. Petitioner does not specify the perjured testimony, nor does he point out the materiality of the stepson's testimony. Incidentally, a reading of the California Supreme Court's opinion, *People v. Simpson*, 43 Cal. 2d 533, shows that the primary witness for the prosecution was one Jimmy Jones. Although the testimony of Donald Dodge was corroborative testimony, the Court pointed out that defendant's inconsistent statements in themselves constituted corroboration.

Furthermore, there is no allegation that petitioner did not know the facts concerning the testimony of Donald Dodge at the trial and that thus he did not have an opportunity to present the truth at the trial. Likewise, there is no explanation of the delay of a period of months before raising this objection to the stepson's testimony. Of course, waiting until the eve of a scheduled execution may be a shrewd defense tactic. This often used technique is designed to and does place great psychological pressure on judges to grant stays of execution.

The orderly, equal, and just administration of criminal law requires that petitioners be required to raise all objections at the earliest possible moment. He should not be permitted to reserve a case for later use.

The California Supreme Court in the case of *In re Swain*, 34 Cal.2d 300, at 303-304, sums up the rule and the justification for the rule as follows:

“... (O)ur determination that the vague, conclusionary allegations in the present petition are insufficient to warrant issuance of the writ is not a ruling on the merits of the issues which petitioner has attempted to raise (citations omitted). We are entitled to and we do require of a convicted defendant that he allege with particularity the facts upon which he would have a final judgment overturned and that he fully disclose his reasons for delaying in the presentation of those facts. This procedural requirement does not place upon an indigent prisoner who seeks to raise questions of the denial of fundamental rights in propria persona any burden of complying with technicalities; it simply demands of him a measure of frankness in disclosing his factual situation.”

Indeed, here *petitioner had counsel*, who conferred with petitioner, and presumably was aware of the California procedural rules. Nevertheless, counsel made no real effort to comply with them. Until he has submitted a petition that conforms to the State procedural requirements, he has not exhausted his State remedy. No exceptional circumstances are alleged to obviate the necessity for exhaustion of State

remedies. The petition was, therefore, properly dismissed.

Indeed, it is well settled that there can be no exhaustion of State remedies until there has been submitted a petition that conforms to State procedural requirements.

Buchanan v. O'Brien, 181 F. 2d 601 (1st Cir., 1950);

Willis v. Utecht, 185 Fed. 2d 810 (8th Cir., 1950);

United States ex rel. Calvin v. Cloudy, 95 Fed. Supp. 732 (D.C. N., 1951).

The United States Supreme Court has stated this rule in the case of *Brown v. Allen*, 344 U.S. 443, at 458, as follows:

“ . . . So far as weight to be given to the proceedings in the courts of the state is concerned, a United States district court, with its familiarity with state practice is in a favorable position to recognize adequate state grounds in denials of relief by state courts without opinion. *A fortiori*, where the state action was based on an adequate state ground, no further examination is required, unless no state remedy for the deprivation of federal constitutional rights ever existed.”

II. THE CALIFORNIA SUPREME COURT ON CONSIDERATION OF THE RECORD AND THE FACTS WITHIN ITS KNOWLEDGE PROPERLY DISBELIEVED THE ALLEGATIONS OF THE PETITION, AND THE UNITED STATES DISTRICT COURT PROPERLY RELIED ON THE CALIFORNIA SUPREME COURT'S DETERMINATION.

Assuming for the purposes of discussion that the California Supreme Court overlooked the failure to comply with the procedural rule, nevertheless the petition was properly denied by the California Supreme Court.

The record of the proceedings in this case shows that petitioner was represented by able counsel at trial, and that the California Supreme Court appointed highly competent counsel to represent him on his appeal to the Supreme Court. Said counsel read the record, conferred with the trial counsel and petitioner while handling the appeal in the California Supreme Court. Certainly, if the record were defective or any fact showing use of perjured testimony was known to either the trial counsel or the appellate counsel, these matters would have been raised. If petitioner was aware of these facts, he could have and should have informed his trial counsel and his appellate counsel in order that they might have raised these questions. It is evident that the California Supreme Court has carefully protected defendant's rights.

The United States District Court could properly rely on the California Supreme Court's consideration of the record and the facts within its knowledge in denying the petition. (*Brown v. Allen*, 344 U.S. 443, 458.)

III. IN THE EVENT THE FEDERAL DISTRICT COURT PROPERLY DENIED THE PETITION BECAUSE THE PETITION DID NOT SUFFICIENTLY ALLEGE FACTS TO SHOW THAT THE APPELLANT HAD BEEN DENIED ANY RIGHT UNDER THE UNITED STATES CONSTITUTION.

The petition does not allege that perjured testimony was knowingly used. The petition simply alleges that a certain witness was told that if he testified he would be given a car and that if he failed to testify he would be prosecuted. Such an allegation does not allege that such testimony was perjured, nor does such a statement allege that the district attorney knew that such testimony was perjured.

Appellant's brief makes much of the fact that this petition was hand drafted. However, his own statement of events indicates that he consulted with petitioner prior to the filing of said petition; that said petition was drafted with the aid and assistance of counsel. Certainly, petitioner's counsel had adequate opportunity to re-frame and to add to the petition before it was filed in the District Court and in the California Supreme Court. The petitioner had the aid of counsel for a period of approximately four months before the United States District Court acted upon this petition. No attempt was made by petitioner's counsel to add to and clarify the allegations of this petition.

The conclusionary allegations of the petition are indeed grave matters. If petitioner's allegations are true, the prosecutor, perhaps the court reporter, are guilty of a conspiracy to commit murder, which in California is punishable by death. Certainly, a frank dis-

closure of the factual situations upon which a petitioner relies in such a case is most reasonable.

CONCLUSION.

It is respectfully submitted that the dismissal of the petition by the Federal District Court be affirmed.

Dated, San Francisco, California,
December 27, 1955.

Respectfully submitted,
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No. 14897.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DE BRETTEVILLE and TREASURE COMPANY, a corporation,

Appellants,

vs.

WALTER B. SCOVILLE and THE ADAMANT COMPANY, a corporation,

Appellees.

APPELLANTS' OPENING BRIEF.

FILED

1958

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No. 14897.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

G. DE BRETTEVILLE and TREASURE COMPANY, a corporation,

Appellants,

vs.

WALTER B. SCOVILLE and THE ADAMANT COMPANY, a corporation,

Appellees.

APPELLANTS' OPENING BRIEF.

Origin of the Appeal.

This is an appeal by G. de Bretteville (hereinafter called "de Bretteville"), and by Treasure Company, a corporation, from the judgment of the United States District Court for the Southern District of California (Central Division) entered in cause designated "1761-Y-Civil" on May 24, 1955 [Tr. pp. 110-112].

The Amended and Supplemental Complaint filed February 23, 1945 by appellees Walter B. Scoville (hereinafter called "Scoville") and The Adamant Company, a corporation (hereinafter called "Adamant Company"), alleged that appellee Scoville is a citizen and resident of Utah and that appellee Adamant Company is a corpora-

tion organized and existing under the laws of Utah with its principal office in Salt Lake City in said State. It asserted two causes of action against both appellant de Bretteville, a citizen and resident of California, and appellant Treasure Company, a corporation organized and existing under the laws of California with its principal office in the County of Los Angeles in said State [Tr. pp. 3-4].

The first cause of action sought an accounting on the operation of a certain oil well known as Treasure Well No. 8 located at Playa del Rey, California, for a period commencing January 31, 1939 and extending to the date of suit. No appeal, is brought to this Court by these appellants in connection with the District Court's ruling on the accounting which was duly rendered by appellant Treasure Company as lessee-operator of the said oil well.

The second cause of action sought damages for appellee *Scoville* from appellants de Bretteville and Treasure Company in the amount of \$26,000.00 plus interest thereon from December 31, 1939 under an alleged *oral* agreement that moneys advanced by appellee Scoville for the completion of Treasure Well No. 8 would be repaid to him on a "two for one" basis [Tr. pp. 4-9]. Liability under the second cause of action was denied in the Answer to the Amended and Supplemental Complaint filed April 19, 1945 by appellants de Bretteville and Adamant Company [Tr. pp. 9-35].

The District Court entered judgment on the second cause of action in favor of *both* appellees Scoville and Adamant Company, against *both* appellants de Bretteville and Treasure Company, in the sum of \$13,000.00, and from this holding this appeal is brought.

Jurisdictional Statement.

The original jurisdiction of the District Court was invoked by appellees Scoville and Adamant Company on the grounds that the action involves a controversy between citizens and residents of different states and that the value of the amount of the controversy exceeds \$3,000.00, exclusive of interest and costs. Appellants de Bretteville and Treasure Company did not controvert the jurisdiction of the District Court.

The jurisdiction of this Court on this appeal was invoked by appellants de Bretteville and Treasure Company under the provisions of 28 United States Code Annotated, Section 1291.

Statement of Facts.

Appellant de Bretteville is president and manager of appellant Treasure Company [Tr. p. 37.]

Appellees Scoville and Adamant Company entered into a certain *written* agreement with appellant Treasure Company on April 5, 1938 [Tr. pp. 27-35]. Appellant de Bretteville was not a party to the agreement.

The agreement recited that Treasure Company was owner of an oil and gas lease on which there was located an incompleated oil well (Treasure Well No. 8) and that in consideration of certain funds to be supplied by Adamant Company for completing the well, Treasure Company would issue to Adamant Company and to Scoville, respectively, certain participating royalty interests in the well.

The rehabilitation of Treasure Well No. 8 commenced about the middle of April, 1938, and continued until the drilling was completed on May 29, 1938 [Tr. p. 223].

A dispute then arose as to the furnishing of funds for completing the well with the required casing, tubing, pumping equipment, etc. A meeting took place, attended by appellees Scoville and Adamant Company and appellant de Bretteville representing appellant Treasure Company [Tr. p. 220]. The dispute was not settled, and further operations at the well were suspended [Tr. p. 221].

Appellant Treasure Company sent notice of default under the aforesaid agreement dated April 5, 1938, to appellees Scoville and Adamant Company [Deft. Ex. "Q,"* Rep. Tr. on State Court appeal, Vol. 5, pp. 1868-1869 and Vol. 2, pp. 903-904].

Henry G. Bodkin, Esq., attorney for appellant Treasure Company, subsequently entered into negotiations to settle the dispute [Tr. pp. 224-225]. Mr. Bodkin explained appellant Treasure Company's position in a letter dated October 17, 1938, to attorneys for appellees [Deft. Ex. "Q," Rep. Tr. Vol. 5, p. 1874, and Vol. 2, pp. 907-908].

A compromise was finally reached, part of which was the dismissal of litigation which had been commenced by appellees Scoville and Adamant Company [Tr. pp. 174-175], and part of which was the execution and delivery to appellant Treasure Company, on or about November 2, 1938, of a written undertaking on behalf of a party named J. Orville Seepie and also on behalf of appellees Scoville and Adamant Company, to furnish the necessary funds for the completion of the well [Deft.

*The entire record on appeal from the Superior Court of Los Angeles County, in case designated No. 441484, was introduced into evidence in the subject lawsuit before the District Court's Special Master as "Deft. Ex. 'Q.'" [Tr. p. 45.] The same complete record was also introduced elsewhere in the trial as "Deft. Ex. 'BBBB.'"

Ex. "C," Tr. pp. 199, 228-229; Deft. Ex. "Q," Rep. Tr. Vol. 2, p. 909]. Said written undertaking is set forth in *haec verba* in the Transcript of Record herein [Tr. p. 35].

Following the compromise settlement, appellees Scoville and Adamant Company assumed full control of further operations at the well through said J. Orville Seepie [Tr. p. 131]. Mr. Seepie had been in charge of drilling operations at the well since the preceding April, when the rehabilitation of the well commenced [Tr. p. 192]. He had originally introduced appellee Scoville to appellant de Bretteville [Tr. pp. 187-188]; and, according to his own testimony, was a creditor of appellee Scoville [Tr. p. 187] who became the beneficial owner of the participating royalty interests claimed by appellee Scoville under the aforesaid agreement dated April 5, 1938 [Tr. p. 193].

Mr. Seepie was the party who executed and delivered to appellant Treasure Company the aforesaid written undertaking, dated November 2, 1938, to furnish necessary funds for the completion of Treasure Well No. 8. He signed on his own behalf, on behalf of his alleged trustee, appellee Scoville, and on behalf of appellee Adamant Company [Tr. pp. 35, 196-197].

Treasure Well No. 8 was completed and put on production on or about December 1, 1938. Two weeks later, Mr. Seepie terminated his activities in connection with the well [Tr. p. 230]. Subsequently, when appellant Treasure Company resumed control of the well, it was discovered that appellee Scoville and said Seepie had acquired casing equipment etc. for the well on credit, with unpaid bills charged against the well amounting to about \$38,000 [Tr. pp. 230-231].

After December 15, 1938, appellant Treasure Company did not receive from either appellee Scoville or from appellee Adamant Company any moneys to cover the completion costs which had been incurred and left unpaid [Tr. p. 232].

Appellant de Bretteville, acting on behalf of appellant Treasure Company, was able to save the venture from immediate liquidation by arranging to have its creditors stand by until they could be paid out of the well's production [Tr. p. 234].

On June 1, 1939, suit was filed in the Superior Court of Los Angeles County (Case No. 441484), in which Scoville and Adamant Company (appellees herein) and said Seepie were included as parties plaintiff, and both de Bretteville and Treasure Company (appellants herein) were parties defendant.

The Complaint filed in the State Court sought a receivership for Treasure Well No. 8, an accounting from both defendants (who were alleged to be owners of the leasehold of Treasure Well No. 8) and an injunction restraining both defendants from interfering with the operation of the well [Deft. Ex. "Q," Clk. Tr. pp. 1-9]. The complaint did not seek recovery of any funds which had been furnished as completion costs for Treasure Well No. 8.

The suit was tried before the Hon. Joseph Vickers who entered judgment on November 27, 1940 (hereinafter called the "Vickers' Judgment") in which he denied

plaintiff's right to a receivership, denied injunctive relief to plaintiffs and held that neither defendant, Treasure Company, nor defendant, de Bretteville, owed anything to any of the plaintiffs as of January 31, 1939 [Deft. Ex. "Q," Clk. Tr. pp. 64-67].

The plaintiffs (appellees herein) appealed from the judgment but it was affirmed by the California District Court of Appeal (Fourth District). (*Walter B. Scoville, et al., Appellants v. G. de Bretteville, et al., Respondents*, 50 Cal. App. 2d 622 (1942).) A hearing by the California Supreme Court was denied on May 18, 1942.

Specifications of Error.

1. The District Court erred in concluding as a matter of law and in holding on the basis of such conclusion of law that G. de Bretteville and Treasure Company (appellants herein) are indebted to Walter B. Scoville and The Adamant Company (appellees herein) for \$13,000.00 constituting reimbursement of advances made for the completion of Treasure Well No. 8 [Conclusions of Law VIII, Tr. p. 109; Judgment, Par. I, Tr. p. 111].

2. The District Court erred in failing to conclude as a matter of law and to hold that the defense of the statute of limitations is available to said G. de Bretteville and to said Treasure Company against any claim asserted by said Scoville and said Adamant Company for said \$13,000.00.

3. The District Court erred in finding that, and in basing its judgment against said G. de Bretteville and

said Treasure Company upon the finding that said Walter B. Scoville did advance the sum of \$13,000.00 to said Treasure Company for the completion of Treasure Well No. 8, and that such funds were advanced prior to completion of said well on or about December 7, 1938 [Finding IV, Tr. p. 103].

4. The District Court erred in failing to find that there is no evidence in this lawsuit which supports allegations set forth in Paragraphs IV and V of the Second Cause of Action of the Amended and Supplemental Complaint filed herein, that said Walter B. Scoville advanced to said Treasure Company and to said G. de Bretteville, between May 15, 1938, and December 15, 1938, the sum of \$13,000.00 for placing said Treasure Well No. 8 on production or otherwise.

5. The District Court erred in failing to find that said G. de Bretteville was not a party to the joint venture for the development of said Treasure Well No. 8.

6. The District Court erred in failing to find and conclude that said G. de Bretteville is not liable for any debts of said Treasure Company to said Walter B. Scoville or to said The Adamant Company, if such indebtedness exists, as a joint adventurer or otherwise or at all.

7. The District Court erred in failing to find and conclude that the stipulation of counsel, entered into in open court in a previous State Court action, as set forth in Paragraph II of the Second Cause of Action in the Amended and Supplemental Complaint herein, does not constitute an admission in this lawsuit that either said G. de Bretteville or said Treasure Company owes to said Walter B. Scoville or to said The Adamant Company the sum of \$13,000.00 or any part thereof.

ARGUMENT.

I.

Appellee Adamant Company Has Not Asserted Any Cause of Action in This Lawsuit to Support the Judgment Rendered in Its Favor Against Both Appellants de Bretteville and Treasure Company.

Paragraph IV of the second cause of action in the Amended and Supplemental Complaint alleges that appellee *Scoville* made advances of \$13,000 which were expended in placing Treasure Well No. 8 on production [Tr. p. 6].

Paragraph V alleges that said \$13,000 was advanced between May 15, 1938 and December 23, 1938 on condition that there would be returned to appellee *Scoville* two dollars for each one dollar so advanced, and that both appellants de Bretteville and Treasure Company agreed to pay the same to appellee *Scoville* out of the production of oil and gas from the said well [Tr. p. 7].

There is no allegation in the pleading that appellee Adamant Company advanced the said \$13,000, nor that it was privy to any agreement with appellants for the repayment of the same, nor that appellee Adamant Company is the *alter ego* of appellee *Scoville*.

Paragraph 3 of the prayer is that "Walter B. Scoville have judgment against defendants * * *" [Tr. pp. 8-9].

The fact is that no recovery was sought for appellee Adamant Company in the Amended and Supplemental Complaint against either appellant de Bretteville or appellant Treasure Company for the repayment of any advances made for the completion of Treasure Well No. 8 and it follows that the District Court has awarded judgment to a party who has not asserted any cause of action therefor.

It is well settled that a judgment for the plaintiff must be supported by a complaint which states a cause of action against the defendant.

McClay v. Meads, 14 Cal. App. 363, at p. 373 (1910);

Austin v. Jones, 6 Cal. App. 2d 493, 44 P. 2d 667 (1935);

49 C. J. S., p. 96, §40(b).

It is also established that a judgment for the plaintiff may not be in direct contradiction to the material allegations of the complaint.

Eaton v. Rocca, 75 Cal. 93, 16 Pac. 529 (1888);

Von Drackenfels v. Doolittle, 77 Cal. 295, 19 Pac. 518 (1888).

II.

There Is No Finding of Fact by the District Court to Support Its Personal Judgment Against Appellant de Bretteville nor Is There Any Evidence in This Lawsuit to Support Such Personal Judgment.

A. The Judgment Holding Appellant de Bretteville Personally Liable Must Be Supported by Sufficient Findings.

49 C. J. S., p. 106, in §45, states:

“A valid judgment must rest on findings, express or implied on all material issues.”

In *Willard v. Glenn-Colusa Irrigation District*, 201 Cal. 726, 258 Pac. 959 (1927), the judgment of the trial court, declaring certain special assessments of the defendant irrigation district illegal and ordering reimbursement to land owner who had paid them, was reversed. The California Supreme Court said at page 749 of 201 Cal.:

“* * * The Complaint contains no averment that all respondents, or any of them, had paid any of said excess tolls or any part thereof and there is no finding that any such payment had been made. This part of the judgment, therefore, even should it be assumed that such tolls are invalid, would not be justified by the pleadings nor supported by the findings.”

See also:

Gordon v. Beck, 196 Cal. 768, 239 Pac. 309 (1925);
Federal Rules of Civil Procedure, Rule 52.

B. The Judgment Is Not Based on Any Finding of Contractual Liability.

The District Court found that it was not true, as alleged by appellees, that either appellant de Bretteville or appellant Treasure Company had agreed to repay appellee Scoville two dollars for each one dollar advanced by him for the completion of Treasure Well No. 8 [Finding V, Tr. p. 103].

No other agreement was alleged by appellees except the aforesaid agreement dated April 5, 1938 [Tr. p. 7]. With respect to this agreement the District Court concluded as a matter of law that whatever rights appellee Scoville and appellee Adamant Company enjoyed thereunder were merged in the “Vickers Judgment” [Conclusion V, Tr. p. 108].

The “Vickers Judgment” was based upon an express finding that de Bretteville was not individually a party to the agreement dated April 5, 1938 [Deft. Ex. “Q,” Tr. p. 31, lines 17-18].

The District Court made no finding that appellant de Bretteville had obligated himself to pay any sum to appellees as a matter of contract.

C. The Judgment Is Not Based on Any Finding of Wrongdoing.

During the trial, appellees Scoville and Adamant Company attempted to elicit testimony to support a finding that appellant de Bretteville is the *alter ego* of appellant Treasure Company [Tr. p. 200].

Appellees later retreated from this position and indicated that it would be satisfactory if judgment could be obtained against appellant de Bretteville in the event it were found that moneys due from appellant Treasure Company had not been accounted for and that he personally held funds which should have been in Treasure Company's pocket [Tr. pp. 211, 219].

The District Court made no finding that appellant de Bretteville is the *alter ego* of appellant Treasure Company, and during the trial made it abundantly clear that there was no sympathy from the Bench for appellee's efforts to have the corporate existence of appellant Treasure Company disregarded [Tr. pp. 200-209].

It should be emphasized that the District Court did find that there were no funds owing to appellees Scoville and Adamant Company in connection with the operation of Treasure Well No. 8 for which appellant Treasure Company had not accounted and that "there were no improper charges or withdrawals or misapplication of funds by defendant Treasure Company or by defendant G. de Bretteville during the period covered by said accounting" [Finding II, Tr. p. 102].

Furthermore, the District Court's Decision, filed April 11, 1955, stated that "no funds in which the plaintiffs or any of the other parties to the action have any interest are now in the possession of the defendants or either of them" [Tr. p. 93].

D. The Judgment Is Not Based on Any Finding That Appellant de Bretteville Received Any Payments for Completion Costs of Treasure Well No. 8.

The District Court's judgment states in paragraph I that judgment in the sum of \$13,000 constitutes "reimbursement to plaintiffs for moneys advanced by *them* to *defendants* as part of the completion costs of Treasure Well No. 8" [Tr. p. 111]. (Emphasis added.)

The District Court's findings do not support the conclusion in the judgment that *both* plaintiffs (appellees herein) made advances of completion costs in the sum of \$13,000 to *both* defendants (appellants herein).

On the contrary, the District Court's finding of fact is that "*Walter B. Scoville* did advance the sum of \$13,000 to *defendant Treasure Company* for the completion of Treasure Well No. 8 and said *Walter B. Scoville* has received back no part of said funds so advanced" [Finding IV, Tr. p. 103]. (Emphasis added.)

Appellant de Bretteville was not a co-owner of the Treasure Well No. 8 leasehold. He managed the leasehold for and on behalf of appellant Treasure Company but, as manager of the operation, he had no individual duty to account to either appellee Scoville or appellee Adamant Company. These particular issues were determined by the Vickers Judgment [Deft. Ex. "Q," Tr. p. 31, lines 19-26; p. 35, lines 21-26; and p. 38, lines 20-21] and are *res judicata*.

III.

The Judgment Is Not Based on Any Finding That Either Appellant de Bretteville or Appellant Treasure Company Has Admitted an Obligation to Repay to Appellee's Scoville and Adamant Company, or Either of Them, Any Payments Made for Completing Treasure Well No. 8.

There is no evidence in this lawsuit from which the District Court could make a proper finding that payments totalling \$13,000 were in fact made by either appellee Scoville or appellee Adamant Company.

But even if the finding could be supported that payments amounting to \$13,000 were made, the obligation to repay them by no means follows as a necessary conclusion of law.

The District Court observed at the conclusion of the trial that there had been no evidence to show that \$13,000 had in fact been advanced unless "there are admissions in the record showing that that amount is *due*" [Tr. p. 238]. (Emphasis added.)

Neither the findings of fact nor the conclusions of law filed by the District Court point to any such admission in the record.

It is apparent, however, that the District Court held that the \$13,000 had been advanced because of what it construed to be an admission in the record. The Court's Decision refers to the sum of \$13,000 "admittedly advanced by Scoville" [Tr. p. 93].

Certainly there is no such admission in the pleading filed by appellants de Bretteville and Treasure Company. Their Answer flatly denied all allegations that they or either of them had agreed to repay "to the said Walter B. Scoville, or to either of said plaintiffs, the sum of

\$13,000.00, or any part thereof, two for one, or the said sum of \$13,000.00, or any part thereof at all" [Tr. p. 12].

Their Answer also set forth as an affirmative defense allegations that funds actually received by appellant Treasure Company after November 2, 1938 for the completion of Treasure Well No. 8 were in pursuance of the compromise settlement of the dispute between appellant Treasure Company and appellees Scoville and Adamant Company. The terms of the settlement on November 2, 1938 were alleged, including the settlement of litigation and the restoration of the contract rights of appellees Scoville and Adamant Company upon their promise to provide the money necessary to complete Treasure Well No. 8 [Tr. pp. 18-19].

Appellees Scoville and Adamant Company argue that the statements made by counsel for appellants de Bretteville and Treasure Company in connection with a stipulation made in case No. 441,484 in the Superior Court of Los Angeles County, as quoted at length in paragraph II of the second cause of action of the Amended and Supplemental Complaint herein, constitutes an admission that the \$13,000 is due to them.

It is submitted that the said stipulation was intended to do nothing more than exclude the issue of the plaintiffs' claim for reimbursement of the \$13,000 from the issues of that particular case. It was not an agreement distinctly and formally made for the express purpose of relieving the plaintiffs from proving any fact. What was said in passing, by way of describing the subject matter of the stipulation, cannot be taken out of context and distorted into an admission which was not intended.

Casaretto v. De Lucchi, 76 Cal. App. 2d 800 at p. 809, 174 P. 2d 328 (1946).

IV.

The District Court's Conclusion of Law IV, That Appellants G. de Bretteville and Treasure Company Are Indebted to Appellees Walter B. Scoville and the Adamant Company for \$13,000.00 Advanced for Completion of Treasure Well No. 8, Consitutes an Erroneous Conclusion That the Defense of Limitations Is Not Available to Said Appellants.

At the conclusion of the trial and after oral argument, the District Court observed that *if there were* admissions in the record showing that the sum of \$13,000.00 is due to appellees Scoville and Adamant Company, then the defense of the statute of limitations would not be available to appellants de Bretteville and Treasure Company [Tr. p. 238].

The defense of the statute of limitations has been raised by appellants de Bretteville and Treasure Company as affirmative defenses in their Answer to the second cause of action in the Amended and Supplemental Complaint [Tr. p. 26].

The Findings of Fact and Conclusions of Law of the District Court make no specific reference to the issue of the applicability of the defense of limitations to the claim for the said \$13,000.00.

The original Complaint in the subject lawsuit was filed on September 10, 1941, and any *oral* agreement involving reimbursement of the said \$13,000.00 which might have been made on or before December 23, 1938 [Tr. p. 7, Par. V], would have been outlawed under the provisions of Subdivision 1 of Section 339 of the Code of Civil Procedure of the State of California.

The Amended and Supplemental Complaint does not assert any right to reimbursement of the said \$13,000.00 under any *written* agreement.

Conclusion.

It is respectfully submitted that the judgment of the District Court is erroneous in so far as it holds that appellants G. de Bretteville and Treasure Company are liable to appellees Walter B. Scoville and the Adamant Company, for the sum of \$13,000 as reimbursement of the costs of completing Treasure Well No. 8.

Respectfully submitted,

JOHN H. RICE, and
NICHOLAS & MACK,

*Attorneys for Appellants G. de Bretteville
and Treasure Company.*



United States
Court of Appeals
for the Ninth Circuit

HERSCHEL BULLEN, MARY H. BULLEN, J.
C. HAYWARD and MARIAN S. HAYWARD,
Appellants,
vs.

G. de BRETTEVILLE, TREASURE COMPANY,
WALTER B. SCOVILLE and THE ADAM-
ANT COMPANY, Appellees.

G. de BRETTEVILLE and TREASURE COM-
PANY, Appellants,
vs.

WALTER B. SCOVILLE and THE ADAMANT
COMPANY, a corporation, Appellees.

Transcript of Record

Appeals from the United States District Court for the Southern
District of California, Central Division

FILED

MAR 20 1956

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No. 14897

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* Page numbers appearing at foot of page of original Transcript of Record.

In the District Court of the United States, Southern District of California, Central Division

No. 1761-P.H.

WALTER B. SCOVILLE and THE ADAMANT
COMPANY, a corporation, Plaintiffs,

vs.

G. de BRETTEVILLE and TREASURE COM-
PANY, a corporation, Defendants.

AMENDED AND SUPPLEMENTAL COMPLAINT

Plaintiffs for their amended and supplemental complaint herein, served and filed under and pursuant to an order of this Court duly made, [and without waiving any of the allegations of plaintiffs' original complaint on file herein,]—stricken 4/2/45.

For a first cause of action, allege:

I.

That the plaintiff, Walter B. Scoville, is a citizen and resident of the State of Utah; that plaintiff, The Adamant Company, is a corporation organized and existing under the laws of the State of Utah with its principal office in the City and County of Salt Lake in said state; that the defendant, G. de Bretteville, is a citizen and resident of the State of California; that the defendant [3] Treasure Company is a corporation duly organized and existing under the laws of the State of California with its

principal office in the County of Los Angeles of said state.

That the subject matter involved in this action is situated within the County of Los Angeles, State of California, and the within action involves a controversy between the citizens and residents of different states. That the value of the amount of the controversy, exclusive of interests and costs, exceeds the sum of Three Thousand (\$3,000.00) Dollars.

* * * * * [4]

For a second cause of action, plaintiffs allege:

I.

Plaintiffs repeat and reallege paragraph I of their first cause of action the same as if set forth in full in this second cause of action.

II.

That at the trial of that certain action entitled Walter B. Scoville, et al., Plaintiffs, versus G. de-Bretteville, et al., Defendants, being docket number 441484 of the files of the superior court of Los Angeles County, California the following statements were made by the judge and counsel as indicated:

Mr. Bodkin: I want to enter my objection at this time. I don't want to waive my objection. I object to the introduction of any evidence concerning the \$13,000.00 which ultimately went into that fund for the completion of the well as to whether it was a contribution, whether it was an advancement, or whether it was to be repaid out of Well No. 8, or whether it was not to be so repaid, upon the ground

it is incompetent, irrelevant and immaterial, and is outside the issues.

The Court: And I will sustain the objection. And you now stipulate, Mr. Bodkin, that it is not within the issues that neither of you are bound, none of the parties in this case are bound as to any of their rights in that matter by virtue of these pleadings, and that the matter is left the same as though this lawsuit had not been brought?

Mr. Bodkin: That is right.

Mr. Allen: I think that is all right.

The Court: And, Mr. Allen, I presume that you agree with Mr. Bodkin, that in so far as the rights of the parties are concerned, there is in this matter no determination as to the status of the \$13,000.00 that has been advanced?

Mr. Allen: Yes, that is a matter that is **not** being raised. [23]

That under the above proceedings all matters pertaining to the \$13,000 was stipulated out of the issues of said action.

That by reason of said stipulation the judgment rendered in said action had no force and effect on the contract of April 5, 1938 between these parties in so far as same applied to the said \$13,000 used in the completion of said well.

III.

That the contract of April 5, 1938 between the parties to this action contained the following provision pertinent to the completion costs of said well known as Treasure No. 8:

“When the first well has been drilled to the basement the parties hereto agree to cooperate in obtaining the necessary casing and other completion equipment and material on credit or in connection with production contracts, or otherwise. If necessary, all monies payable on the royalties to be issued to Second and Third Parties, and the interest retained by First Party, after payment of operating expenses, shall be made available to pay for such completion costs.”

That under said clause of said contract, a copy of which contract is attached to the original complaint in this action and marked Exhibit A and incorporated herein by reference, the costs of completion of said well were chargeable against the monies payable on the royalties of the parties to this action.

That under said clause and contract the plaintiffs were not required to raise or invest any moneys for the completion of the well.

IV.

That after said well was drilled to the basement the defendants failed and refused to put up or raise any moneys for the purpose of placing the well on production and the plaintiff, Walter B. Scoville, was thereby compelled to and did raise the sum of thirteen thousand (\$13,000) dollars in order to secure a producing [24] oil well as contemplated by said contract and the said \$13,000 was expended and used in the placing on production of said well with the full knowledge of the defendants.

V.

That the said Scoville between May 15, 1938 and December 23, 1938 advanced and paid into the project said thirteen thousand (\$13,000) dollars upon condition that there was to be returned to him the sum of two dollars for every one dollar so advanced and to be paid out of the production of oil and gas from said well after the payment of operating expenses and other completion costs and the defendants accepted said moneys under said condition and agreed to so repay same to said Scoville.

That other than the contract of April 5, 1938 there was no other written agreemnt between these parties pertaining to said \$13,000, or any sums used in the completion of the well.

VI.

That said Scoville has received back no part of the moneys so advanced and no part of the additional moneys agreed upon, although the first well has produced oil and gas and defendants have sold same for an amount of at least Two Hundred and Five Thousand, Four Hundred and Eleven and 68/100 (\$205,411.68) Dollars.

VII.

That the superior court in the action mentioned in paragraph II of this second cause of action decreed that all moneys received from the sale of oil and gas from said well after same was placed on production and up to and including December 31, 1939 were properly expended in operating said well

and paying completion costs other than those paid by the said \$13,000.

VIII.

That an accounting of the receipts and expenditures of said well since December 31, 1939 is necessary to ascertain that since said date there has or has not been sufficient funds in [25] addition to necessary operating and completion costs of said well to repay to said Scoville the \$13,000 on the basis of two for one as alleged herein.

Wherefore, plaintiffs pray judgment:

1. That the defendants be required to account for all receipts and expenditures pertaining to said Treasure Well No. 8, since December 31, 1939, and that the expense of said accounting be borne solely by said defendants.

2. That the Court determine the amount of funds received by the defendants from the sale of the products of Well No. 8 between December 31, 1939 and down to date of judgment and determine the reasonable amount to be allowed the defendants for the operation of said well during this period, and that the Court give the plaintiffs judgment according to their respective interests together with interest at the rate of seven per cent per annum from the respective dates that the portions of said amount became due.

3. That Walter B. Scoville have judgment against defendants for twenty six (\$26,000.00) thousand dollars together with interest at the rate

of seven per cent per annum from December 31, 1939.

4. That the plaintiffs have and recover their costs of suit herein incurred, and for such other and further relief as to the Court seems proper and equitable and for general relief.

/s/ LELAND J. ALLEN,

/s/ K. K. STEFFENSEN,

Attorneys for Plaintiffs [26]

Duly Verified. [27]

Affidavit of Service by Mail attached. [28]

[Endorsed]: Filed February 23, 1945.

[Title of District Court and Cause.]

ANSWER TO SECOND AMENDED AND
SUPPLEMENTAL COMPLAINT

(Filed herein February 23, 1945)

The defendants, G. de Bretteville for himself alone, and Treasure Company, a corporation, hereinafter designated as the Treasure Company, for itself alone, answer the plaintiffs' Second Amended and Supplemental Complaint filed herein February 23, 1945, as follows: [31]

* * * * *

Answer to Second Cause of Action

* * * * *

II.

Answering Paragraph II of the said second cause of action these defendants deny, and each of them

denies, that by reason of the stipulation mentioned in said Paragraph II, the said judgment in said Action No. 441-484 had no force or effect on the contract of April 5, 1938, in so far as the same applied to the said \$13,000.00 alleged to have been used in the completion of said well, and allege that said judgment is final and conclusive as to the rights of the parties to said action in said Treasure Well No. 8 and its production, and in connection with all of the issues determined in said Findings and Judgment in said case, even though it might now appear that the so-called \$13,000.00 issue, if presented in the pleadings in said case or properly at the said trial thereof, might have given any of the parties herein some other or different rights.

III.

Answering Paragraph III of said second cause of action these defendants deny, and each of them denies, that the costs of completion of said Treasure Well No. 8 were chargeable against the moneys payable on the royalties of the parties to this action, and in this respect allege that under the terms of said contract of April 5, 1938, and a written agreement of November 2, 1938, (said last mentioned agreement being hereinafter described in defendants' first affirmative defense to said second cause of action, and a copy thereof being attached hereto as Exhibit H) the plaintiffs were obligated to pay all of the completion costs of said Treasure Well No. 8 [78] as hereinafter in said first affirmative defense alleged.

Further answering Paragraph III of said second cause of action these defendants deny, and each of them denies, that under the clause of said contract of April 5, 1938, quoted in said paragraph, or under said contract, the plaintiffs were not required to raise or invest any moneys for the completion of Treasure Well No. 8, and in this respect allege that the said plaintiffs were required to furnish all the money necessary to complete Treasure Well No. 8 by the terms of said contract of April 5, 1938, and under the terms of said written agreement of November 2, 1938, as hereinafter alleged in defendants' first affirmative defense to the said second cause of action.

IV.

Answering Paragraph IV of said second cause of action these defendants deny, and each of them denies, that they, or either of them, were required to put up or raise any money for the purpose of putting Treasure Well No. 8 on production, and allege that the plaintiffs herein were, and each of them was, obligated and required by the terms of said agreements of September 5, 1938, and November 2, 1938, to put up and raise all money necessary to put said well on production, and any moneys raised or put up by the plaintiffs, or either of them, as alleged in said Paragraph IV, were raised and put up under the terms and conditions of said agreements of April 5, 1938, and November 2, 1938; further answering said Paragraph IV these defendants deny, and each of them denies, that either plaintiff raised or put up \$13,000.00, or any part

thereof, excepting only the sum of \$11,500.00, advanced by the plaintiffs, as hereinafter in defendants' first affirmative defense alleged.

V.

Answering Paragraph V of said second cause of action these defendants deny, and each of them denies, that plaintiffs herein, or either of them, between May 8, 1938, and December 23, 1938, or at any time, advanced or paid into the Treasure Well No. 8 project, or [79] for the use or benefit of these defendants, or either of them, or for said Treasure Well No. 8, the sum of \$13,000.00, or any part thereof, or any sum of money whatever, upon condition that there was to be returned to the said Walter B. Scoville, or to either of said plaintiffs, the sum of two dollars, or any sum, for every one dollar advanced by plaintiffs, or either of them, out of the production of oil or gas from said Treasure Well No. 8 after the payment of operating expenses, or other completion costs, or that any such repayment was to be made from any source; that these defendants deny, and each of them denies, that they, or either of them, ever accepted any money from plaintiffs, or either of them, or from any one, upon condition that it be repaid two dollars for one dollar, and these defendants further deny, and each of them denies, that they, or either of them, ever agreed to repay to the said Walter B. Scoville, or to either of said plaintiffs, the sum of \$13,000.00, or any part thereof, two for one, or the said sum of \$13,000.00, or any part thereof at all; deny that

there was no other written agreement pertaining to said \$13,000.00 or pertaining to the moneys advanced for the completion of the well, but allege that the sum of \$11,500.00 was paid in part payment of the cost of completion of said well, under the terms set forth in the contract of April 5, 1938, and the contract of November 2, 1938, as particularly set forth in defendants' first affirmative defense to said second cause of action.

VI.

Answering Paragraph VI of said second cause of action, these defendants deny, and each of them denies, that the plaintiffs, or either of them, advanced the sum of \$13,000.00 to or for said well, or any part thereof, except only \$11,500.00 advanced as alleged in defendants' first affirmative defense to the second cause of action; admit that no part of said \$11,500.00 has been repaid, and deny that it ever was to be repaid. [80]

VII.

Answering Paragraph VII of said second cause of action these defendants deny, and each of them denies, that the Superior Court in said Action No. 441484 excepted from its decree in said action payments of completion costs which were paid with money advanced by plaintiffs, or either of them, and allege that by said decree, and by the stipulation mentioned in said cause of action, merely the issue as to plaintiffs' claim for reimbursement for an alleged \$13,000.00 was excepted or reserved from said decree.

VIII.

Answering Paragraph VIII of said second cause of action these defendants deny, and each of them denies, that an accounting of the receipts or expenditures of said well since December 31, 1939, is necessary to ascertain whether since said date there have been sufficient funds in addition to necessary operating or completion costs of said well to repay to the said Walter B. Scoville, or to any one, the sum of \$13,000.00, or any part thereof, or any sum, on the basis of two for one, or on any basis at all.

First Separate and Affirmative Defense to the Second Cause of Action.

I.

On and prior to April 5, 1938, defendant Treasure Company was the owner and holder of certain oil and gas leases in Playa Del Rey Oil Field, Los Angeles County, California, including a certain lease known as the Fletcher lease upon which said defendant had a partly completed oil and gas well known as Treasure No. 8, herein designated as Treasure Well No. 8.

II.

At said time defendant Treasure Company was without money or means to complete said well and required certain financing in connection with the completion of said well and the carrying out of a [81] drilling program on other oil and gas leases situated in said Playa Del Rey Oil Field and belonging to said defendant.

III.

On or about April 5, 1938, said defendant and plaintiffs herein entered into a written contract providing for the furnishing of money for such drilling program and fixing the rights and liabilities of the parties thereto. That a copy of said contract is annexed to this answer and marked Exhibit A, and is hereby made a part hereof, with the same force and effect as if herein set forth in full.

IV.

Under the terms of said contract, The Adamant Company, a corporation, plaintiff herein, was granted a twenty-five per cent participating royalty interest in the leases described there, under its terms and conditions, and particularly the lease upon which the said Treasure Well No. 8 was and is situated. That Walter B. Scoville, plaintiff herein, by its terms was also granted a nineteen per cent participating royalty interest in said lease, under the terms and conditions of said contract. The Corporation Commissioner of the State of California issued a permit approving the issuance and granting of said participating royalty interests, said interest, by the terms of the permit, to be held in escrow with the Commissioner of Corporations of the State of California.

V.

After the execution of said contract of April 5, 1938, the said Treasure Well No. 8, under the terms of said contract, was drilled to a depth of approxi-

mately 6510 feet by May 29, 1938, and during said time had passed through certain oil bearing sands. That at said time drilling of said well was discontinued, although at said time the parties to this action were of the opinion that said well would be a large producer of oil and gas.

VI.

The said contract of April 5, 1938, provides in part as [82] follows:

"Whereas, First Party now desires to complete said well on the Fletcher lease and Burns No. 1 lease and to drill a second well on Burns No. 2 lease and its third well on Burns No. 3 lease, and will require certain financing in connection with this program; and * * *

"When the first well has been drilled to the basement the parties hereto agree to cooperate in obtaining the necessary casing and other completion equipment and material on credit or in connection with production contracts, or otherwise. If necessary, all monies payable on the royalties to be issued to Second and Third Parties, and the interest retained by First Party, after payment of operating expenses, shall be made available to pay for such completion cost."

VII.

In the month of May or early in June, 1938, various sums of money were due others in connection with the drilling of said well and plaintiffs failed and refused to advance money for such purpose;

that at said time a disagreement occurred between plaintiffs herein and defendant Treasure Company as to the meaning of said contract of April 5, 1938, and as to whether plaintiffs and said defendant would be required, under said agreement, to raise the money between them, and stand the cost of completing said well and putting it on production, or whether the second and third parties to said contract, plaintiffs herein, were required to raise and to pay said money for such completion; that a controversy also at said time arose as to the parties who would supervise the completion of said well.

VIII.

The plaintiffs herein refused to advance the money necessary to complete said well, and put it on production, and insisted that they had the right to designate the person or persons who would supervise the completion of the well, in the event funds were made [83] available for such purpose. That defendant Treasure Company insisted that said plaintiffs provide the money for the completion and placing of said well on production, and that a person agreeable to it be in charge of the completion of the well. That thereupon, upon plaintiffs' failure to advance said money, Treasure Company served notice of termination of all the rights of the plaintiffs in said leases and under said contract, on the ground that they and each of them had failed to perform their part of said contract and had forfeited all rights in said leases and under said contract, by reason thereof.

IX.

On September 16, 1938, The Adamant Company, a corporation, and Walter B. Scoville, plaintiffs herein, after the service of the said notice of default and for termination, instituted a certain action against Treasure Oil Co., Ltd., a corporation, and G. de Bretteville, being Action No. 432115 in the Superior Court of the State of California, in and for the County of Los Angeles, in which complaint it was alleged that Treasure Oil Co., Ltd., was sometimes known as Treasure Company. Plaintiffs in said action sought declaratory relief, and alleged that a controversy existed between the parties to said action concerning the construction of said contract and the rights and duties of the parties thereto, and as to whether the plaintiffs therein were required to furnish all funds or credit for the completion of said Treasure Well No. 8, or whether such duty devolved upon plaintiffs and defendants in said action, and as to whether Treasure Company could rescind or terminate said contract, as well as to the amount of royalty owned by plaintiffs. Defendants herein filed an answer thereto admitting said controversy existed and setting forth the claims of Treasure Company. That as a result of said controversy said well was not completed or placed in operation and mud was pumped into said well in the latter part of April or early May, 1938, where it remained until November, 1938. [84]

X.

On or about November 2, 1938, plaintiffs herein

agreed in writing to furnish the money necessary to complete said well, upon condition that the notice of default and termination served by Treasure Company be withdrawn; that plaintiffs herein be restored to all their rights under the contract, and that Oliver Maze be employed as the superintendent in charge of the completion of said Treasure Well No. 8. That said plaintiffs at said time further agreed to and did dismiss said Action No. 432115. That defendant Treasure Company in consideration of said promise, agreed to restore plaintiffs to all their rights under said contract and consented to said Oliver Maze being superintendent for the completion of said well, and consented to the dismissal of said action, upon plaintiffs' promise to provide the money necessary to complete said well, and, thereupon, in consideration of such promises on the part of plaintiffs to furnish said money, relieved said plaintiffs from default under said contract, and restored them to their rights thereunder. A copy of said written agreement of November 2, 1938, is attached hereto as Exhibit H and by this reference made a part hereof.

XI.

Thereupon pursuant to said agreement plaintiffs furnished \$5,000.00 to enable work to be started and said Oliver Maze was placed in charge of said well as superintendent and continued in such position until on or about December 15, 1938, during all of said time being in actual charge of the drilling and completion of said well. That the \$5,000.00 so fur-

nished was secured by plaintiff Walter B. Scoville through selling and assigning to Herschel Bullen and Mary S. Bullen, his wife, and J. C. Hayward and Marian S. Hayward, his wife, two of the nineteen one per cents granted to him under the permit, of the Corporation Commissioner of the State of California, and defendants are informed and believe and upon such information and belief allege that said \$5,000.00 was obtained pursuant to a written agreement [85] between the said Herschel Bullen and Mary Bullen, J. C. Hayward and Marian S. Hayward, on the one side, and the plaintiffs herein, Walter B. Scoville and The Adamant Company, and The Walter B. Scoville Company, on the other side, made and entered into by said parties on or about September 27, 1938, wherein and whereby the said plaintiffs agreed to cause two one per cent participating royalty interests in the leases described in said agreement of April 5, 1938, to be transferred to the said Herschel Bullen and Mary Bullen and J. C. Hayward and Marian S. Hayward, who therein and thereby agreed to advance to the said plaintiffs the said sum of \$5,000.00, and that by said agreement of September 27, 1938, the said plaintiffs and the said Walter B. Scoville Company agreed to repay to said persons said \$5,000.00, two for one out of the first fifteen per cent of gross production of said Treasure Well No. 8. A copy of said agreement of September 27, 1938, is attached hereto as Exhibit I and by this reference made a part hereof.

XII.

On or about November 2, 1938, as a part of the settlement of the controversy between the parties hereto, by an instrument executed and delivered by plaintiffs on such date, but which instrument was dated June 23, 1938, one J. Orville Seepie was constituted managing agent for plaintiffs in said drilling program, described in said contract, and Harry Wynn was thereafter constituted and appointed a member of such executive committee, the other members being G. de Bretteville and J. Orville Seepie. That a copy of said agreement is hereto annexed and attached, marked Exhibit B and made a part hereof. Immediately after executing said agreement said Harry Wynn signed and delivered to Treasure Company his resignation as a member of said committee.

XIII.

That J. Orville Seepie and Harry Wynn, as members of said executive committee, with the consent and approval of plaintiffs, and [86] to the exclusion of G. de Bretteville, and against the will of Treasure Company, took over the completion of said Treasure Well No. 8, on or about November 2, 1938, and the said superintendent Oliver Maze worked directly under their direction until on or about December 15, 1938. That on said date plaintiffs abandoned said Treasure Well No. 8, and defendant Treasure Company took over the management and control thereof and has continued in possession and control thereof until this date; plaintiffs leaving

approximately \$30,000 in debts against said well which Treasure Company was forced to pay.

XIV.

That notwithstanding their promise to furnish the money necessary to complete said well, said plaintiffs failed and refused to do so, save and except that plaintiffs furnished the sum of \$11,500.00, (which included the aforesaid \$5,000.00) and no more, for the purpose of completing said well and placing it on production. The said \$11,500.00 advanced by the plaintiffs, as aforesaid, was merely a part of the purchase price paid for the interests of the plaintiffs in said Treasure Well No. 8 and they should not be repaid the whole or any part thereof by these defendants, or either of them, or from the production of said well.

Second Separate and Affirmative Defense to the Second Cause of Action.

I.

These defendants refer to their first separate and affirmative defense to the said second cause of action, and by this reference here repeat and replead each and every allegation, denial and admission therein contained.

II.

On or about the 17th day of June, 1938, in order to obtain capital to finance the completion of said Treasure Well No. 8, the plaintiffs induced one Spencer L. Halverson to guarantee in writing the

purchase price of casing placed in said well and purchased from [87] Oil Tools Corporation by plaintiffs, said purchase price then being \$15,000.00, with a down payment of \$2,500.00, which plaintiffs herein had agreed to pay. A copy of said written guaranty agreement is attached hereto as Exhibit J, and by this reference made a part hereof.

Notwithstanding the obligation of plaintiffs, and their promise to furnish all money necessary to complete said well and place it on production, the plaintiffs, and each of them, failed to pay said down payment of \$2,500.00 to the said Oil Tools Corporation and the said Spencer L. Halverson became obligated to pay, and paid said sum of \$2,500.00 to Oil Tools Corporation.

Thereafter, on July 25, 1940, the said Spencer L. Halverson caused an action to be commenced in the Superior Court of the State of California, in and for the County of Los Angeles, entitled: Selegna Petroleum Corporation, a corporation, and Spencer L. Halverson, Trustee, vs. Walter B. Scoville, The Adamant Company, a corporation, and others, including the defendant Treasure Company, defendants, and numbered 454440 in the files of said court, wherein judgment was sought against the defendants therein named in the sum of \$2,500.00 for said sum advanced by the said Spencer L. Halverson, as aforesaid, and also sought to recover the sum of \$10,000.00 from The Adamant Company, Walter B. Scoville and The Walter B. Scoville Company, and Treasure Company. By reason of said action it became necessary for the defendant Treasure

Company to employ the said Henry G. Bodkin as its attorney to defend said action and as a result the defendants have incurred a reasonable attorney's fee for such services, as well as costs incurred in said case. Said attorney's fee and costs are proper charges against the plaintiffs' interests in said Treasure Well No. 8.

By stipulation between the plaintiffs herein and Treasure Company and the plaintiffs in said Action No. 454440, a judgment was rendered therein against plaintiffs herein and the defendant Treasure Company for the sum of \$2,500.00 without interest or costs, which said [88] sum of \$2,500.00 was paid by Treasure Company out of the production of said Treasure Well No. 8. In said action it was expressly stipulated and agreed by and between the plaintiffs herein and the defendant Treasure Company that the question as to which of said defendants in said Superior Court action was chargeable with said sum of \$2,500.00 was left open and undetermined to be thereafter determined. Said \$2,500.00 paid by Treasure Company, as aforesaid, is a part of the \$13,000.00 which plaintiff seeks to recover from defendants in their said second cause of action. The plaintiffs herein are chargeable with the whole of said sum of \$2,500.00 because of their promise to furnish all money to complete said well and place it on production, and said sum is a proper charge against plaintiffs' interests in said well.

Third Separate and Affirmative Defense to the Second Cause of Action.

I.

These defendants refer to the allegations contained in their second separate and affirmative defense in this answer, and by this reference repeat and replead each and every allegation therein contained.

II.

These defendants refer to the allegations contained in Paragraph II, Subdivision (g-2) of their first separate and affirmative defense in this answer and by this reference repeat and replead each and every allegation therein contained.

III.

By reason of the foregoing there is pending, and was pending at the time this action was commenced, another action, said Bullen and Hayward Action No. 447435 in the Superior Court of the State of California, in and for the County of Los Angeles, wherein the plaintiffs therein seek to recover from the plaintiffs herein and the defendants herein, [89] a portion of the money claimed by the said plaintiffs in said second cause of action, to wit, \$10,000.00, being the \$5,000.00 advanced by the said Bullen and Hayward to the plaintiffs herein, as aforesaid, to be repaid on the basis of two dollars for one dollar.

IV.

As long as said Action No. 447435 is pending and undetermined this action should not proceed as to said \$5,000.00, or said plaintiffs in said Action No. 447435 should be made parties hereto.

Fourth Separate and Affirmative Defense to the Second Cause of Action.

I.

The cause of action stated in the second cause of action in said second amended and supplemental complaint is barred by the provisions of Subdivision (1) of Section 339 of the Code of Civil Procedure of the State of California.

Fifth Separate and Affirmative Defense to the Second Cause of Action.

I.

The cause of action stated in the second cause of action in said second amended and supplemental complaint is barred by the provisions of Section 343 of the Code of Civil Procedure of the State of California.

Wherefore, the defendants pray for judgment as follows:

1. That said causes of action, and each of them, be dismissed as to these defendants, and each of them, and they be given their costs incurred herein;

2. That it be adjudged and decreed that plaintiffs are not entitled to an accounting and that the accounts heretofore filed herein and presented to plaintiffs, be adjudged full and complete accounts;

3. That if an accounting be adjudged necessary, it be adjudged that all expenditures made and expenses incurred by the defendant Treasure Company in connection with the production of said Treasure Well No. 8, and in connection with the litigation hereinabove mentioned were and are

proper charges against said well, as shown by the books of Treasure Company, and that plaintiffs are chargeable with their proportionate share thereof; and that plaintiffs be charged with those items which defendant Treasure Company has charged against them on its books, and which defendants have herein alleged should be charged against plaintiffs;

4. That if said claim for \$13,000.00, or any part thereof be adjudged not barred by the Statute of Limitation, that the portion thereof which may be allowed as a charge against said well be charged against plaintiffs' interest therein;

5. That the attorney's fees and other costs incurred in this case on behalf of defendants be allowed as a charge against said Treasure Well No. 8, and against plaintiffs' interests therein;

6. For such other and further relief as may be proper, and for costs of suit.

Dated: April 18, 1945.

BODKIN, BRESLIN & LUDDY,

/s/ By HENRY G. BODKIN,

Attorneys for Defendants. [91]

EXHIBIT "A"

AGREEMENT

This Agreement, made this 5th day of April, 1938, between Treasure Company, First Party, The Adamant Company, Second Party, and Walter B. Scoville, Third Party,

Witnesseth:

Whereas, First Party is the owner of an Oil and Gas Lease, dated March 11, 1935, from Edwin M. Fletcher, Jr. and Mary A. Fletcher, his wife, to Treasure Oil Company, Ltd., covering Lots Nine (9), Ten (10) and Eleven (11), Block 33, Tract 9809, as recorded in Book 145, Page 91 et seq. of Maps, records of Los Angeles County, State of California; and

Whereas, an incompleated well has been drilled to a depth of five thousand feet (5,000') on Lot Nine (9), above mentioned; and

Whereas, First Party has acquired an Oil and Gas Sub-lease from Robert S. Burns and Sarane Otis Burns, his wife, covering Lots Seven (7), Eight (8), Thirty-five (35) and Thirty-six (36) in the above described Block and Tract, which said Sub-lease it is proposed to combine with the above mentioned Fletcher lease into one drillsite; and

Whereas, First Party has acquired from said Robert S. Burns and wife another Sublease hereinafter referred to as "Burns lease No. 2" and covering the following described property:

Said property is located in the County of Los Angeles, State of California, more particularly described as: Lots One (1) to Five (5), both inclusive, Lots Thirty-eight (38) to Forty-two (42), both inclusive, in Block 33; Lots Ten (10) to Fifteen (15), both inclusive and Lots Fifty (50) to Fifty-five (55), both inclusive, in Block 34; Lots Ten (10) to Fifteen (15), both inclusive, Lots Seventy-one (71) to Seventy-six (76), both inclusive, in Block 36, all

in Tract 9809, [92] as per map recorded in Book 145, Pages 91 et seq. of Maps, in the office of the County Recorder of said County; and

Whereas, First Party has acquired another Sublease from Robert S. Burns and wife, hereinafter referred to as "Burns lease No. 3" and covering the following described property, located in Los Angeles County, California:

Lots Six (6), Thirteen (13), Fourteen (14), Fifteen (15), and Twenty-six (26) to Thirty-four (34), both inclusive, and Lot Thirty-seven (37) Block 33; Lots Sixteen (16) to Twenty-six both inclusive, and Lots Thirty-nine (39), Forty (40) and Forty-two (42) to Forty-nine (49), both inclusive in Block 34; Lots Sixteen (16) to Twenty-four (24) both inclusive, Lots Twenty-six (26) and Sixty-one (61) to Seventy (70), both inclusive in Block 36, all in Tract 9809, as per map recorded in Book 145, Pages 91 et seq., of Maps, in the office of the County Recorder of said County; and

Whereas, First Party now desires to complete said well on the Fletcher lease and Burns No. 1 lease and to drill a second well on Burns No. 2 lease and its third well on Burns No. 3 lease, and will require certain financing in connection with this program; and

Whereas, Second Party desires to obtain an interest in said property and to furnish working capital to the extent of Ten Thousand Dollars (\$10,000.00) for the purpose of carrying the above program into effect; and

Whereas, Third Party has rendered extensive services in working out this agreement and expects to assist in carrying out the above described drilling program,

Now, Therefore, in consideration of the premises and the [93] several undertakings hereinafter set forth, the parties to this Agreement hereby mutually agree as follows:

1. The execution of this Agreement and the operations thereunder are wholly conditioned upon the issuance by the Commissioner of Corporations of a permit authorizing the participating royalty interests hereinafter described.

2. First Party agrees to file and prosecute an application with the Commissioner of Corporations for such a permit immediately upon the execution of this contract.

3. First Party has arranged for the use of the derrick, rotary drilling outfit, tools, drill pipe, pumps, etc., now located on the Fletcher property, as well as certain drill pipe and other equipment located near Bakersfield, and First Party hereby agrees that all of such equipment shall be available for use in connection with the above drilling program.

4. Second Party agrees to advance, upon the issuance of the above mentioned permit, the sum of Ten Thousand Dollars (\$10,000.00) to First Party to be used solely and exclusively for the purpose of deepening and completing the well on the Fletcher lease. Said funds shall be carried in a special bank account of Treasure Company, and all

checks thereon are to be jointly signed by said Treasure Company and J. Orville Seepie, of Los Angeles, California.

5. Upon the issuance of said permit and as consideration for said sum of Ten Thousand Dollars (\$10,000.00) First Party agrees to issue participating royalty interests to the Second and Third Parties as follows:

(a) To Second Party a twenty-five percent (25%) participating royalty interest on all of the above described leases.

(b) To Third Party a participating royalty interest of nineteen percent (19%) in the Fletcher and Burns No. 1 lease if the well is completed for [94] less than one thousand (1,000) barrels, which said royalty shall be reduced to sixteen and one-half percent (16½%) if said well is capable of producing one thousand (1,000) barrels or more per day upon completion; eighteen and one-sixth percent (18-1/6%) participating royalty interest in Burns No. 2 lease; and eighteen and one-sixth percent (18-1/6%) participating royalty interest in Burns No. 3 lease.

It is understood that after providing for landowner and overriding royalties, the issuances of the participating royalties above set forth, and certain other minor issuances, which will be requested in said application for permit, First Party will have remaining approximately twenty-five percent (25%) of any production which may be obtained from the above leases.

6. It is agreed that the royalty interests to be is-

sued to Second and Third Parties shall be issued into escrow and remain in escrow at least until the completion of the above described drilling program, and that such intention and desires shall be affirmatively expressed in the above mentioned application for permit.

7. It is understood that the participating royalties to be issued to Second and Third Parties, together with the interest remaining in First Party after all of the issuances hereinabove mentioned, shall be subject to their prorata share of all operating and maintenance charges on the first and any succeeding wells. As to the minor issuances above mentioned, it is understood that five percent (5%) in all of the leases and one percent (1%) in the first well shall bear their prorata share of operating and maintenance expenses, but not to exceed Ten Dollars (\$10.00) per month per well for each one percent (1%). [95]

When the first well has been drilled to the basement the parties hereto agree to cooperate in obtaining the necessary casing and other completion equipment and material on credit or in connection with production contracts, or otherwise. If necessary, all monies payable on the royalties to be issued to Second and Third parties, and the interest retained by First Party, after payment of operating expenses, shall be made available to pay for such completion costs. It is agreed, that should Second Party and Third Party decide, after the first well has been drilled to the basement schist, that they do not desire to proceed further, this

contract shall then be terminated and they will quitclaim to First Party all of the interests to be received by them hereunder, except one-third ($\frac{1}{3}$) of their interests in the first well. It is also understood that should the first well be completed for two hundred (200) barrels per day or less, this contract shall terminate, and Second Party and Third Party will thereupon quitclaim to First Party all of their interests hereunder, except as to such first well.

After such completion costs have been paid, then one-half ($\frac{1}{2}$) of the net sum payable to Second and Third Parties on account of such royalties, and one-half ($\frac{1}{2}$) of the sum accruing to First Party by reason of its remaining interest shall be impounded in a special fund for the sole and exclusive purpose of defraying the drilling and completing costs of a second well.

After the second well has been completed and paid for, then a similar impound from the same source shall be accumulated to cover the cost of drilling and completing a third well. After the third well has been completed and paid for, then the respective interests of the parties hereto shall be subject only to the necessary expenses incident to the operating, maintenance and repairing of said wells. If any further wells are to be drilled on Burns Lease No. 2 or Burns lease No. 3, the financing thereof shall be arranged by subsequent agreement between the parties. [96]

It is agreed that first party shall receive Five Thousand Dollars (\$5,000.00) for the use of its

drilling equipment on each well, except the first well, and that such amount shall be accumulated in each of the above mentioned drilling funds for the second and third wells.

8. It is understood that the royalties herein provided and to be issued to Second Party and Third Party are not for distribution, and that they are to remain in escrow until the above described three well program has been completed, or until the parties agree upon an earlier termination of the drilling program. In any event, they shall remain in escrow until released by the Commissioner of Corporations. While such royalty interests are in escrow, Second Party and Third Party agree to make no transfers thereof or therefrom without the written consent of the Commissioner of Corporations.

J. Orville Seepie, on behalf of Second Party and Third Party, and G. DeBretteville, on behalf of First Party, shall form an executive committee to have joint control and advisory powers with respect to all drilling and producing operations hereunder. No purchases shall be made on credit and no expenditures or other obligations incurred without the joint approval of both members of said committee.

In Witness Whereof the parties hereto have duly executed this agreement the day and year first above written.

Treasure Company,
By G. deBretteville

The Adamant Company,
By Helen Scoville, Sect'y.

Second Party

Walter B. Scoville,

Third Party

[97]

* * * * *

EXHIBIT "H"

[Halverson & Halverson, Lawyers, Letterhead]

The Treasure Company November 2, 1938
2600 Washington Blvd., Venice, California.

Gentlemen:

The undersigned, for and on behalf of the Adamant Company, Walter B. Scoville, and himself, hereby agrees that Oliver Maze shall be employed as Drilling Superintendent and Tool Pusher in connection with the completion of the Treasure Well, now being drilled on Lot 9, Block 33, Tract 9809, Del Rey Hills, California, and we will assure you the necessary funds will be forthcoming to complete said well.

Yours very truly,

J. Orville Seepie

Walter B. Scoville,

By J. Orville Seepie, His Agent

The Adamant Company

By J. Orville Seepie, Its Agent [144]

* * * * *

Duly Verified.

Acknowledgment of Service attached. [153]

[Endorsed]: Filed April 19, 1945.

[Title of District Court and Cause.]

REPORT OF SPECIAL MASTER

Your special master herein was appointed by an order entered April 16, 1946, which directed him to take testimony and make findings of fact as to each of the items in issue respecting the following questions:

(a) With respect to each item listed in the Second Amended Complaint herein, beginning at line 22, page 6 thereof, and continuing on pages 6 to 19 thereof, both inclusive thereof, to line 26, page 19 thereof, the person, firm or corporation to whom each expenditure was paid and whether or not each recipient of a payment actually received the money, and what said recipient gave in return therefor.

(b) Whether, in case of each of said items, the [158] material purchased or service paid for was used in, upon or for said Treasure Well No. 8, and

(c) Whether, in case of each of said items the price paid for the material purchased or service paid for, was the reasonable value of such material or service, at or about the time the material was purchased or service rendered in the area in which such material was purchased or service was rendered.

The Parties and the Issues:

The plaintiffs are Walter D. Scoville, a resident of the state of Utah, and the Adamant Corporation, a Utah corporation, and defendants are the

Treasure Company, a California corporation, and Guy de Bretteville, the president and manager thereof, a resident of California.

The controversy arises from the operation of an oil and gas well known as Treasure Well No. 8 in Los Angeles County on property described as follows: Lots 9, 10, 11 of Block 30, Tract 9809 as per map recorded in Book 145, Page 91 et seq. map records of Los Angeles County, California. The property was taken in a condemnation suit by the United States on September 28, 1942.

The plaintiffs' first cause of action is for an accounting by the defendants of their operation of Treasure Well No. 8 from December, 1939, to November, 1943. The Second Amended Complaint sets out at pages 6-19 many items which they call upon the defendants to justify. The defendants in their answer deny in a great part that these are improper charges and that many issues of fact are *res judicata* by reason of a judgment entered in *Scoville et al., vs. de Bretteville et al.*, No. 441, 484 in the Superior Court of the State of California, in and for the County of Los Angeles, affirmed in the case of the same name, 50 Cal. App. (2nd) 622. [159]

The file in this case shows that an audit was made, pursuant to an order of the District Court, by Irwin Lampe, an associate of Claude I. Parker. It is evident that this audit which covered a month to month record of receipts and disbursement of the defendant corporation was the basis of plaintiffs' pleadings of p. 6-19 of their second amended complaint, the effect of which is to put in issue all

disbursements made by the defendants as shows by that audit.

Your special master met with the parties and their counsel in an effort to reduce and clarify the matters in issue. This resulted in an order directing the defendants to bring in an account in writing of all receipts and disbursements and to produce their books, records, and vouchers for examination. An account prepared by Gerald E. Moore, defendant's auditor, was filed. Mr. Moore was produced as a witness for examination. The books and records produced by the defendants were made available in the office of the special master for examination by the plaintiffs. By order of the special master, the plaintiffs filed written objections to the Moore audit. Upon this audit and plaintiffs' objections thereto the issues to be determined in this accounting were drawn. As heretofore stated, these steps were taken for the purpose of reducing and clarifying the number of items in dispute. However, the results were disappointing. The defendant's objections to the account covered practically all items of expenditure. By a later stipulation the accounting was limited to the period from December, 1939, to September 28, 1942, which latter date was the time of seizure by the United States.

Thereafter the matter was set down for the taking of testimony and beginning December 10, 1946, and continuing thereafter with occasional adjournments to January 9, 1947, evidence both oral and documentary was received. Subsequently briefs were filed by the parties and the matter submitted.

Plaintiffs state their objections under 21 headings. Hereafter these objections will be considered in the order adopted by the plaintiffs with some variations in the interest of convenience.

Res Judicata

On this general issue the following findings are made:

(1) That on June 1, 1939, an action was filed in the Superior Court in and for the County of Los Angeles by Walter B. Scoville, J. O. Seeples, Harry Wynn and the Adamant Corp., against G. de Bretteville and Treasure Company, a corporation, for an accounting, injunction and the appointment of a receiver which case is No. 441, 484 in that court. An answer was filed. The parties of the same name in this action are identical with the parties to that action. The case was tried without a jury, Findings of Fact and Conclusions of Law were made by the court and a Judgment entered. This judgment was affirmed upon appeal by the District Court of Appeal and is now final.

(2) That the accounting prayed for in the said action concerned the operation of Treasure Well No. 8, which was located on a leasehold on the property described as Lots 9, 10 and 11 of Block 33, Tract 9809, Los Angeles County which is the subject matter of the accounting in the instant case.

(3) That in the said action in the Superior Court an accounting was had of the operation of the said well for the period April 5, 1938 to December 31, 1939.

That upon the issues involved in said accounting the Superior Court made the following findings:

"That for the period from December 16, 1938, to and including December 31, 1939, said defendant G. de Bretteville, acting on behalf of the defendant Treasure Company, was constantly supervising said well and the production thereof; that under his management the production of said well was increased and has not substantially declined therefrom; that he supervised the selling [161] of the oil, gas and gasoline produced from said well and secured the best possible price for said products; that said defendant G. de Bretteville, by his manner of production and operation increased the gravity of said oil and produced said well at its maximum capacity and his said acts in so doing were in accord with the general oil field practice; that it was necessary that said well have a manager and supervision and the sum of \$250.00 a month is, and at all times during which said services were performed were, a reasonable amount to be allowed said defendant G. de Bretteville for his services as supervisor and manager of said Well No. 8."

"That Court finds that it was necessary, proper and in accordance with good oil field practice to have three men, other than the manager, each working eight hour shifts to produce said well so that one employee will be at said well at all times; that as shown by said account prepared by Eugene M. Berger, the sum of \$500.00 a month has been paid as salary to said three men since December 16, 1938, for operating said well "Treasure No. 8", and

the Court finds that such expenditures were proper, necessary and reasonable, and allows the said expenditure and the whole thereof as a charge against said Well No. 8."

"That the sum of \$29.00 a month was paid by the defendant Treasure Company for office help during the period from January 1, 1939, to and including July 31, 1939; the Court finds that said sum of \$29.00 a month is and was reasonable and that said expenditure was necessary in the operation of said well and is allowed in the full amount; that the sum of \$37.50 a month was paid by the defendant Treasure Company for office help during the period from August 1, 1939, to and including December 31, 1939; the Court finds that the sum of \$25.00 was a reasonable amount to pay for such office help during said period and that it was a necessary expense and properly chargeable against said well."

It was further found by the Superior Court that of a total of \$735.77 charged as telephone expenses against the said well the sum of \$622.24 was a necessary and reasonable charge.

(4) That during the period of this accounting as compared with the period of accounting in the Superior Court case, there occurred no material changes in the conditions under which the well was operated, other than those attributable to the economic factors brought about by World War II, and reflected in scarcities of labor and materials.

(5) That during the period of this accounting as compared with the period of accounting in the Superior Court case the same method of operation

and management of Treasure Well No. 8 were carried on by the defendants, and the production from the said well was of comparable quantity and quality.

(6) That concerning the contract dated April 5, 1938, out of which that action and the instant suit arose, the Superior Court found:

“That the contract dated April 5, 1938, a copy of which is attached to defendants’ answer, and the addendum thereto, a copy of which is set forth in plaintiffs’ complaint, were terminated as of January 31, 1939, save and except that the plaintiffs, The Adamant Company and Walter B. Scoville and their assigns, are entitled to retain their respective interests in said lease hereinbefore described upon which said well “Treasure No. 8” is drilled, to-wit, twenty-five per cent (25%) therein to The Adamant Company, a corporation, and nineteen per cent (19%) therein to Walter B. Scoville, both of which interests are subject to any assignments made and subject to their pro rata share of the completion, operating, and maintenance costs and charges of said well.”

Conclusions

There is identity of parties and issues in this action [163] and the Superior Court action. The judgment in the prior case clearly estops the plaintiffs from relitigating the essential matters decided in that case. *Williams vs. Hawkins* 34 Cal. App. 146. *Sutphin vs. Speik* 15 Cal. (2) 195. The doctrine of *res judicata* will not be applied to prevent a

reexamination of the same question where in the interval between the two actions the facts have materially changed so as to alter the legal rights of the litigants. *Hurd vs. Albert* 214 Cal. 15, 76 A.L.R. 1348. Inasmuch as the accounting periods in the two actions differ it has been necessary to examine the prior case to determine whether or not there are material changes in the factual situation such as would alter the rights of the parties.

As to the broader issues involved, such as the manner in which the well was managed and the nature and value of defendant de Bretteville's services, there is no change in the factual situation. The evidence in both cases is similar and there is identity of witnesses and testimony on many points. Upon a review the evidence in this case would support the findings and judgment made by the Superior Court. This is not to say that the evidence herein would not support findings less favorable to the defendants. In making findings herein the master has based findings on certain issues solely upon the doctrine of *res judicata*. It will be indicated hereafter which findings are made upon that doctrine.

Objection I.

Salary paid to defendant de Bretteville.

The master finds that this issue was determined in the Superior Court action and that the sum of Two Hundred Fifty Dollars a month is the reasonable value of the services rendered by defendant de Bretteville.

Objection II.

The master finds that M. Jones was employed to perform stenographic and clerical services for the operation of Treasure Well No. 8, and that she also performed services for the Samarkand Oil Company and the defendant de Bretteville and that the Superior [164] Court found that for the same services during the period August 1, 1939 to December 31, 1939, that the reasonable wages for her services were Twenty-five Dollars a month.

It is your special master's conclusion that this objection to this charge be sustained as to any amount in excess of \$25.00 a month.

Objection XV.

This objection goes to expenditures for office supplies and stationery. The master finds that these charges were reasonable and proper charge against the operation of the well.

Objection XVI.

The master finds that defendant de Bretteville maintained an office from which he transacted the business of operating Treasure Well No. 8 in the house in which he lived but separate from the living quarters of his family and that the charge of \$15 a month as rent was a reasonable charge against the operation of the well.

Objection III.

During this accounting period the defendants, Treasure Company and G. de Bretteville were par-

ties defendant in several law suits which directly or indirectly involved Treasure Well No. 8. The expenses of defending these actions, including court costs, attorney's fees, bond premiums, accounting costs, appeal costs and pay of experts, were charged against the operation of Treasure Well No. 8. (Moore Audit, pp E-40, C-41, C-42). Details concerning the defendants position and participation in these actions are found in the testimony of Henry Bodkin (Transcript p. 578 et seq.) The original files of the Superior Court in and for Los Angeles County were before the master during the taking of testimony. Copies of the enrolled papers in each case are in evidence. (Exhibits Q, R, S and T.)

Separate findings and conclusions will be made as to each [165] of these cases, as follows: Scoville et al vs. G. de Bretteville, et al, No. 441, 484 in the Superior Court in and for Los Angeles County.

Findings

That this action is the case referred to above in findings on the issue of res judicata and the findings previously made are incorporated as a part of these findings.

That it appears that a stipulation was entered into that the question of whether or not either party was entitled to attorneys' fees in connection with the preparation and trial of the case should be left for future determination without prejudice (Findings p. 24, Paragraph XXIV, Exhibit Q), but that no mention thereof is made in the Judgment entered in the case.

That the litigation was between parties who were asserting hostile interests and the plaintiffs were asserting a right to possession and operation of the well.

That in the said case the Superior Court allowed charges against the well for the services of guards to prevent the unlawful seizure by the plaintiffs of the property on which the well was located. (Findings p. 20, paragraph XXI (H), Exhibit Q).

That the services of Henry G. Bodkin and his associates were reasonably worth the amount of Twelve Thousand six hundred and Fifty Dollars of which Seven Thousand Dollars has been paid on account and that the other charges incident to the suit were necessary expenses and charges made therefore are reasonable.

Conclusions

The defendants justify these charges on the theory that the defense of this action was necessary to their continued possession and operation of the well under the contract of April 5, 1938, as interpreted by the Superior Court and that as a matter of law a binding precedent is found in the decision of the Superior Court that the cost of protecting the leasehold property [166] by guards was a proper charge against the well.

At best, the defendants' argument can be considered as an attempt to draw an analogy. The protection of property against unlawful trespass and the defense of an action brought in a court of com-

petent jurisdiction to obtain possession, are different things.

The allowance of attorneys' fees in adverse actions in the Superior Court is governed by sec. 1021, Code of Civil Procedure. The whole question turns upon the law as effecting the allowance of attorneys' fees in that action rather than upon rules governing accounting practice. Neither by agreement or by statutory provision are attorneys' fees allowable in the Superior Court action. The law appears to be well settled. Sec. 1021, Code of Civil Procedure, *Salmina vs. Juri*, 96 Cal. 418, *L. A. Trust, etc. vs. Ward* 197, Cal. 103, *Estate of Marra*, 19 Cal. (2) 191, *Kahn vs. Smith* 23, Cal. (2) 12.

It is the conclusion of the master that the costs of litigation in this Superior Court action are not allowable as charges against the well, except insofar as allowed as costs in the Judgment of the Superior Court. *Kier Corporation vs. Treasure Oil Company* in the Superior Court in and for Los Angeles County.

Findings

That this action was brought by the plaintiff against the Treasure Oil Company, Ltd. for breach of an oil and gas lease entered into between the plaintiff as lessor and the Treasure Oil Company, Ltd., as lessee, covering land other than that which is the subject of the contract in issue in the instant case; and that this cause of action appears to be based upon the alleged breach of a contract to include the leased land in a community drilling project.

That the Treasure Oil Company, Ltd., was a corporation [167] owned by defendant de Bretteville and members of his family and was the predecessor in interest in and the grantor of title to the lease, here in issue, to the defendant, Treasure Company, and that later in the action the Treasure Company was added as the real party in interest and defended the action.

Conclusion

In this action the Treasure Company and de Bretteville were defending title to their leasehold interest against an action based upon a contract and not upon any matter that appeared in the record chain of title to the leasehold.

In entering into the agreement of April 5, 1938, the defendants warranted by implication that they had good title to the leasehold and the right to contract freely in relation thereto. It follows that the defense of that title is wholly their responsibility. All charges relating to this law suit are disallowed. *Herschel Bullin et al vs. Walter B. Scoville, et al*, No. 44734 in the Superior Court in and for Los Angeles County.

Findings

That this is an action brought by Bullin and his wife and J. C. Hayward and his wife, upon a contract entered into between them and the Adamant Company and Walter B. Scoville and the Walter B. Scoville Company and that the subject matter of that contract was the royalty interest of Walter B. Scoville and the Adamant Company in Treasure

Well No. 8, and that the Treasure Company and de Bretteville were not parties to the contract but were joined as parties defendant because the plaintiffs claimed an interest under their contract with Scoville and the Adamant Company in funds alleged to be in the hands of the Treasure Company.

That the Treasure Company and de Bretteville filed an answer by their attorney Henry G. Bodkin and that he and his associates have performed services in relation to said action of [168] the value of \$1,187.50 and that said action is still pending and undetermined.

Conclusion

The pleadings in this action do not show that de Bretteville and the Treasure Company are hostile litigants in relation to their co-defendants Scoville and the Adamant Company. It follows that the rule applied in the Superior Court case of Scoville vs. de Bretteville does not apply here. Here it is a question of accounting: whether or not the cost of defending this action is a cost properly chargeable to the maintenance and operation of Treasure Well No. 8. It is the master's conclusion that it is a proper charge in that the action arose out of a contract dealing with the proceeds of the well and that the Treasure Company and de Bretteville are under a duty to defend such an action to preserve for proper distribution, funds resulting from the operation of the well, which the Treasure Company held. *Selegna Petroleum Corp., et al vs. Walter B. Scoville, et al*, No. 45,440 in the Superior Court in and for Los Angeles County.

Findings

That this action was brought by the Selegna Petroleum Company and Spencer L. Halverson, as Trustee, for breach of a contract to save them harmless from a guarantee of the credit of the Treasure Company, that the appearing defendants in the action who were also parties to the contract were Walter B. Scoville and the Adamant Company by Leland J. Allen and the Treasure Company by Bodkin, Breslin and Luddy.

That the action resulted in a stipulated judgment for Twenty-five hundred Dollars with the question of liability as between the defendants undecided.

That the contract from which this action arose was for the purpose of obtaining materials to complete Treasure Well No. 8.

That the reasonable value of the services of counsel in this case is in the amount of \$1,412.50, and that accounting costs [169] of the reasonable value of \$111.00 are properly chargeable to this action.

Conclusion

This is much the same situation as that in the Bullin & Hayward case except that in this case the Treasure Company was privy to the contract in issue. The controversy arose out of matters relating to the completion and operation of the well and it follows that the law suit expenses are a proper charge against the well.

Objection IV.

This objection goes to the telephone bills charged against the well. Admittedly \$358.27 was improp-

erly included in this charge. Objection is sustained in that amount and not sustained as to the remainder.

Objection V.

This objection goes to expense of maintaining and renting automotive equipment. These charges are sustained by evidence. The objection is overruled.

Objection VI.

The items here objected to concern the services of Mr. Gerald E. Moore who audited the books of the company relating to the operation of the well. The charges are reasonable and the work charged for was done. The objection is overruled.

Objection IX.

All items of interest were paid to taxing agencies or upon unpaid balances to suppliers of equipment. Moore Audit, I-40, J-42. These were proper charges and are allowed.

Objection X.

Defendants' auditor admitted that an item of \$330.21 or \$331.00 charged as an operating expense in 1940 was disallowed by the Internal Revenue Bureau and that they were required to treat it as an addition to capital assets. Transcript P. 50-51.

Defendants' counsel, at a later date, identified this charge as relating to a purchase of sucker rods and pipe. Defendants' Brief P. 41. If that contention is correct this [170] objection should be treated in the same manner as Objection VII.

However, there is a possibility that the proper

reference is to an item of expense involved in the Superior Court action. Exhibit 3, p. 5 of Report of Internal Revenue Agents. If this is the fact, then the matter is covered by the rulings under Objection III.

Objections VIII, XI, XII, XIII, XIV, XVI, XX

These objections go to the actual costs of operating the well — labor, power, supplies and like charges.

Except for the addition of a so-called “gravity retainer” the operation of the well during the period herein questioned was the same as that during the period covered by the Superior Court action. The addition of the gravity retainer may or may not have benefited the well, but in doing so Mr. de Bretteville was acting within the discretion which his responsibility as manager entitled him to exercise. Otherwise the issues raised are controlled by the Superior Court decision. The objections are overruled.

Objection XVII.

This objection goes to charges for insurance. The automobiles used in the operation of Treasure Well No. 8 were not the property of leasehold. They were owned by the Treasure Company or Mr. de Bretteville and during most of this period the well paid for their use on a mileage basis. The insurable interest rested in the owners of the vehicles. In case of loss they and not the well would have been the beneficiaries. The other charges for insurance

related to property on the leasehold. The objection is sustained only insofar as it goes to expenditures for insurance on automotive equipment.

Objection XVIII.

This objection goes to several tax items charged to the operation of the well. [171]

A charge of \$100.00 as of January 31, 1940, is admittedly improper. Of this \$25.00 is properly chargeable.

Capital stock and franchise taxes, which are presumed to have accrued due to the corporate nature of the Treasure Company, are clearly not properly charged to the operation of the well.

The well owned no automotive equipment, and it follows that license fees and taxes for such are not proper charges.

Formal objection was made to the inclusion of Federal income and excess profits taxes as an operating cost. Upon reading plaintiffs' briefs, the special master felt that counsel had overlooked the implications of several recent decisions that had bearing on the subject. Briefs were called for and subsequently were filed.

At the outset it is observed that the Treasure Company returned the whole of the net income of Well No. 8 and claimed all allowances for depletion.

The nature of the plaintiffs' interest in the production of the well was settled in the Superior Court case. The plaintiffs retained a percentage interest in the lease subject to their pro-rata share of the completion, operating and maintenance costs.

The right to fully control and operate the well went to defendants herein as of January 31, 1939. No trust relationship or association of the kind described in *Helvering vs. Combs*, 296 U.S. 365, existed after that date if any ever did exist.

The rule laid down in *Burton-Sutton Oil Co. vs. Commissioner*, 328 U.S. 25, appears to govern the right to claim depletion and the correlary liability for payment of Federal income tax on income from the leasehold in question. In that case the taxpayer had acquired by contract the right to develop and operate a leasehold. It was to pay to the transferor 50% of the net income derived from oil produced after deducting certain specified [172] operating charges. The court held that the right to claim depletion deductions depends upon whether the one claiming such deductions has an economic interest in the production of the well. In the instant case by contract and by the judgment of the Superior Court, the plaintiff's interest in the well is fixed as a percentage of the net profit from the production of Treasure Well No. 8. This is the same factual situation as that found in the *Burton-Sutton* case, *supra*, except for this difference—in the *Burton-Sutton* case, the operating company was the transferee of the rights to operate the leasehold, while in this case, the defendant company had control over the operation of the well during the accounting period and were the transferors of the participating interest. The master can find nothing in the *Burton-Sutton* Case which gives any significance to this difference.

The disallowance of this item works a hardship on the defendant corporation in that it has paid the tax and cannot at this late date apply for a refund. It can only be said that any taxpayer acts at his own peril, including the risk of a decision of the Supreme Court contrary to a theory, however logical, upon which he has relied.

The master concludes that any payments of Federal income taxes, including excess profits tax, are not a proper charge against the operation of the well.

Social Security taxes were paid on the employees working on the leasehold. This is a proper operating charge.

Objection VII.

The objection under this heading goes to expenditures for casing, tanks, and equipment and seems to be based on an item in The Parker audit which referred to such items as items purchased but not found on the leasehold at the time of that audit. Under objection XXI the plaintiffs make general objection [173] to the alleged failure of defendants to list capital assets. Your special master is confused as to what theory the plaintiffs are presenting. Attention is called to plaintiffs' brief pp 55 and 62 et seq., Transcript p. 27, p. 352-355, p. 1072.

Casing, tanks, sucker rods, pumps and the like, when purchased for use in the operation of an oil well, become capital assets. Under proper accounting practice they are carried as capital assets subject to depreciation. It appears that many items of this character are included in the Moore audit as maintenance and operating expenditures. An

example is found in Schedule C-42. An item of \$3,579.96 paid to the General Pipe and Supply Co. was for new casing. This casing was placed on the leasehold and not used prior to the time the well was taken over by the government. It probably became a part of the subject matter of the suit brought against the Union Oil Co. by The Treasure Company which resulted in a judgment in favor of the Treasure Company for the value of all personal property taken by the United States.

In making tax returns The Treasure Company has been required to capitalize some of these expenditures. See Tax Returns. Plaintiffs' Exhibit 3.

Except for certain items such as the aforementioned purchase of casing, there is an insufficient record here to make a satisfactory adjustment of these matters. It is entirely possible that upon the final liquidation of this operation and the division of funds realized from capital assets, this will become a moot question. Eventually there must be a final accounting between the parties. The best course now is to overrule this general objection without prejudice to the consideration of these questions in the adjustment of the parties' interests in the capital assets of the venture. [174]

Objection XIX.

Plaintiffs conceded that the charge of \$306.25 was properly made following the order of Judge Vickers in the Superior Court case.

(Note that under this heading plaintiffs have objected to an item of \$2,525.19. The master held that

this matter was not before him under the order of reference herein.)

Objection XXI.

Under sub-headings 2, 3, and 4, the plaintiffs put in issue a series of money transactions between defendant de Bretteville and the bank account of Treasure Well No. 8. Mr. de Bretteville feared attachments. He withdrew during 1942 a total of \$46,096.29 from the Treasure Well No. 8 bank account. With these funds he purchased cashier's checks, which he redeposited in the account as money was needed for operating expenses. The tracing of these funds has been a long and tortuous process. Although some redeposits were made after the end of the accounting period, all withdrawals were redeposited. This operation may be eliminated from this accounting.

Under sub-heading 1, the plaintiffs question the accounting of the capital assets fund. They contend that many of the charges for supplies should be charged to capital assets rather than operating accounts. Your special master believes that this contention is covered under the headings Objections VII and X.

In 1943, after the end of this accounting period, defendant de Bretteville recovered \$1,059.80 representing the sale of chemicals to the Union Oil Co. This transaction is not within the scope of the accounting.

This report in draft form was submitted to counsel for all parties for the purpose of receiving their suggestions for amendment or correction. Suggest-

tions were filed by counsel. The master has reconsidered his report and reached the conclusion [175] that the report should be filed in substantially the form in which it was drafted. The following additional observations were added.

1. The accounting period is limited to those transactions had between December 1939 and September 28, 1942. Only in the matter of tracing the funds withdrawn and held in the form of cashiers checks and then redeposited has the master gone beyond that date. Some redeposits were made after September 28, 1942.

2. This report may be incomplete in that it does not make specific findings on some matters. It is the master's intention to set out his conclusions and explain the theories adopted. Upon this report and any modifications made by the District Court, formal findings may be prepared. Your special master will assist in settling findings if the court directs him to do so.

Your special master has devoted in excess of 28 days to the hearing of this matter and the preparation of his report and requests the court to fix his compensation and order payment thereof.

Returned herewith is the file in the case together with a transcript of the testimony taken, exhibits and papers filed during the course of the reference.

Respectfully submitted,

/s/ DAVID B. HEAD,

Special Master

[176]

[Endorsed]: Filed Dec. 8, 1948.

[Title of District Court and Cause.]

MOTION AND NOTICE OF MOTION FOR
LEAVE TO INTERVENE

To: The plaintiffs above named and their attorney,
Leland J. Allen, Esq.; and the defendants above
named and their attorney, Claude A. Ferguson,
Esq.:

Please take notice that the undersigned, on behalf
of the applicants Herschel Bullen and Mary H.
Bullen, his wife, and J. C. Hayward and Marian S.
Hayward, his wife, will move this Court, before
the Honorable Peirson M. Hall, Judge Presiding,
at his Court Room in the Federal Building, 312
North Spring Street, Los Angeles, California, on
Monday, the 11th day of August, 1952, at 10 o'clock
in the forenoon, or as soon thereafter as counsel
can be heard, for [177] leave to intervene in this
action on the following grounds:

(1) That the above named applicants are so situated as to be adversely affected by a distribution of property which is in the custody of the Court.

(2) That the applicants' claim and the main action have questions of law and fact in common.

The motion will include a request for leave to file a complaint in intervention substantially in the form of the proposed complaint annexed hereto.

The motion will be based upon this notice, the affidavit of Fulton W. Hoge filed herewith, the files and records of said cause, and, also, the files and records in the case of United States vs. Certain Parcels of Land, No. 2454-B-Civil.

Applicants will rely upon Rule 24 (a) (3) and (b) (2) as authority for said motion.

WILLIAMSON, HOGE & CURRY,
/s/ By FULTON W. HOGE,
Attorneys for the applicants Herschel Bullen and
Mary H. Bullen, J. C. Hayward and Marian
S. Hayward. [178]

* * * * *

Affidavit of Service by Mail attached. [193]

[Endorsed]: Filed Aug. 7, 1952.

[Title of District Court and Cause.]

OPPOSITION TO MOTION FOR LEAVE TO INTERVENE

To: Herschel Bullen and Mary H. Bullen, J. C.
Hayward and Marian S. Hayward, and to Wil-
liamson, Hoge and Curry, their attorneys:

Walter Scoville and The Adamant Company, a
corporation, oppose the motion to intervene because:

- (1) The application is not timely made;
- (2) The applicants are not so situated as to be adversely affected by the distribution of cash or property in the custody of the Court;
- (3) That the applicant's claim and main action have no questions of law and facts in common with these plaintiffs;
- (4) That the statute of limitations of the State

of [201] California has run against the alleged contract dated September 27, 1938 and marked "Exhibit A", attached to applicants' proposed complaint and intervention;

(5) That by failure of applicants to obtain personal service upon Walter B. Scoville in its action filed on April 10, 1940 in the Superior Court of the State of California, in and for the County of Los Angeles, or to faithfully prosecute said action, applicants have no cause of action or right of intervention against Walter B. Scoville;

(6) That in the condemnation action, Case No. 2454-B-Civil of this District Court, applicants took no part in the jury trial of said cause and made no presentation of evidence of their interests before the jury;

(7) That applicants, as owners of 2 per cent working interest in Treasure Well No. 8, have the right to an accounting action against defendants G. de Bretteville and Treasure Company, which is separate and distinct from the cause of action of these plaintiffs;

(8) That any amounts due these applicants by reason of their ownership of working interests in Treasure Well No. 8, are separate and distinct from any amounts due these plaintiffs;

(9) That the statute of limitations has run against any rights of accounting of these applicants against the defendants G. de Bretteville and Treasure Company;

(10) That the United States Court of Appeals of

the Ninth Circuit made no ruling authorizing these applicants to intervene in the instant case;

(11) That the so-called two for one agreement which applicants are attempting to enforce by intervention was held to be a personal matter between these applicants and Walter B. Scoville in the condemnation action;

(12) That the Circuit Court of Appeals was without jurisdiction [202] to in any manner pass upon the issues involved in the instant case;

(13) That the award in the condemnation action was for the ownership of working interests in the Treasure Well No. 8 leasehold and did not pertain to any accounting for prior production or any bonus contracts.

(14) That in the condemnation action it was stipulated by these applicants that total production of Treasure Well No. 8, up to the time the government took possession of the well, and all the moneys received from said production, was handled by Treasure Company.

Rep. Tr., Page No. 1235—2454 H. W. Civil.

Hence Scoville, who never received any of the production moneys, is not chargeable to applicants by intervention.

Dated: August 11, 1952.

/s/ LELAND J. ALLEN,
Attorney for Plaintiffs Walter B. Scoville and
Adamant Company. [203]

[Endorsed]: Filed Aug. 11, 1952.

[Title of District Court and Cause.]

MEMORANDUM AND ORDER

Hall, D. J.

The proposed complaint in intervention is cast in one count only but, according to the prayer and the briefs in support of the motion to file the proposed complaint in intervention, it depends upon actually two causes of action; the first, to join with the plaintiffs in the instant case for an accounting against the original defendants on certain oil royalties; and the second for an accounting and judgment against the plaintiff Scoville arising in connection with a so-called "two for one" agreement.

As to the accounting against defendants de Bretteville and Treasure Company; it appears from the proposed complaint in intervention that the applicants Bullen and Hayward have a participating royalty interest [205] in the well from which the money now on deposit in court was derived after condemnation by the government. That is the same type of interest for which the plaintiff Scoville seeks an accounting from the defendants de Bretteville and Treasure Company. That interest appears to have derived from Scoville. It is clear, therefore, that the applicants Bullen and Hayward have an interest in the accounting which Scoville seeks from the defendants de Bretteville and Treasure Company, that there are common questions of law and fact, and are therefore entitled to intervene.

As to the "two for one" agreement. Recitation of

the long and tedious history of this litigation is unnecessary here. The defendants de Bretteville and Treasure Company are not objecting to the intervention. It is only the original plaintiff, Scoville, who, in addition to many other points, urges that the statute of limitations now prevents the applicants Bullen and Hayward from joining in any suit. I think the statute of limitations does not prevent the intervention.

Rose vs. Conlin, 52 Cal. App. 225, is authority for the proposition that the cause of action in that case arose when there was a res to which the remedy sought could be applied; and also as authority for the proposition that the claimant in that case could have intervened in the suit which resulted in a money judgment constituting the res. In that case a controversy arose concerning foreclosure of mortgages and a taking by the Southern Pacific Railroad which the court finally held was a condemnation and gave a money judgment. The holder of a deficiency on a mortgage foreclosure did not intervene in the litigation which resulted in the condemnation judgment, but chose rather to sue after the award for the condemnation was made. [206]

The court held that the statute did not begin to run until the award was made and the judgment for money, i.e., the res came into being.

Applying the doctrines of that case to the instant one it appears that the "two for one" agreement called for the payment of money out of production of an oil well. But before the oil well could produce sufficient money to satisfy the agreement the gov-

ernment condemned and took the property. On a jury trial an award was made for the taking, which included the value of future production; and Scoville's interest in future production was not determined until the time that judgment became final. The judgment may well have been in the condemnation suit that the future production of the well had no value. The statute began to run, not from the date that the government took the property in 1942, but rather began to run at the time the awards were made final, which was not until the mandate from the Circuit Court in July 1952. It was not until the mandate came down that Scoville's interest in the award was fixed as the sum of \$30,672. That money is on deposit in this court. Under the opinion of the Circuit Court this money cannot be distributed until the within accounting action is determined. It follows that the statute of limitation has not run and that the proposed complaint in intervention is timely.

While the Circuit Court affirmed the holding of the trial court that "the enforcement of the so-called "two for one" agreement between the Bullens and the Haywards and Walter B. Scoville is a personal matter and is not a matter for settlement in the within case", it is to be noted that that holding was confined to the "within case," viz.: the condemnation case. I do not regard such a holding as [207] precluding the Bullens and the Haywards from intervening in this case which is certainly an entirely different case than the condemnation case.

Whether a lien exists in favor of those holding

the "two for one" agreement or not, and whether such a "two for one" agreement is or is not a royalty interest or an interest in land, the fact nevertheless remains that the award in favor of Scoville included the value of future production and now stands as money on deposit in court in place and stead of the original oil well or Scoville's interest in it, and under the doctrine of *Rose vs. Conlin*, supra, did not actually come into being as a res until July 1952, as above indicated. Clearly, therefore, the applicants will or might be adversely affected by the distribution to Scoville of his share of the money on deposit in court.

I have examined the other objections raised by Scoville and deem them to be without merit.

The applicants, Bullen and Hayward, are, therefore, entitled to file the Complaint in Intervention, as to the first cause of action as a matter of discretion, and as a matter of right under Rule 24(a)(3) as to the second cause of action.

It is ordered that the proposed complaint in intervention be filed on condition that the plaintiff redraft the same and separately state his causes of action.

Los Angeles, California, Oct. 30, 1952. [208]

[Endorsed]: Filed Oct. 30, 1952.

In the District Court of the United States, Southern District of California, Central Division

No. 1761-P.H.-Civil

WALTER SCOVILLE, et al., Plaintiffs,

vs.

G. DE BRETTEVILLE, et al., Defendants.

HERSCHEL BULLEN and MARY H. BULLEN,
his wife, J. C. HAYWARD and MARIAN S.
HAYWARD, his wife,

Plaintiffs in Intervention,

vs.

TREASURE COMPANY, a corporation, WALTER
SCOVILLE, and THE ADAMANT COMPANY,
a corporation,

Defendants in Intervention.

COMPLAINT IN INTERVENTION

Come now the plaintiffs in intervention and, by leave of Court, file this, their complaint in intervention. For a cause of action against the defendant Treasure Company, being their first cause of action, the plaintiffs in intervention allege: [209]

I.

That on or about the 27th day of September, 1938, plaintiffs in intervention Herschel Bullen and J. C. Hayward entered into a certain contract in writing whereby plaintiffs in intervention agreed to and did advance the sum of \$5,000.00 to or for the benefit of defendant Treasure Company and defendants in intervention Walter B. Scoville and

The Adamant Company, for the purpose of completing and bringing into production a certain oil well situated on certain leasehold premises known as the Fletcher Lease, being Lots 9, 10 and 11 in Block 33 of Tract 9809, as per map recorded in Book 145, pages 91 et seq. of Maps, in the records of the County of Los Angeles, State of California.

II.

That said defendant in intervention Walter B. Scoville, and said two corporations, to wit, Treasure Company and The Adamant Company, were jointly interested in the drilling of said well, known as Treasure Well No. 8.

III.

That under the terms of said contract it was agreed that the plaintiffs in intervention should receive the following:

(1) A participating royalty interest in said well amounting to 2 per cent in the aggregate, which royalty was to be assigned to the plaintiffs in intervention by Walter B. Scoville out of certain royalty interests theretofore acquired by him from defendant Treasure Company.

(2) The sum of \$10,000.00, to be paid to the plaintiffs in intervention out of the first 15 per cent of gross production from said well.

IV.

That the contract above mentioned is set forth in a letter from plaintiff in intervention Herschel Bullen to George Halverson, an attorney for de-

defendant in intervention Walter B. Scoville, dated [210] September 27, 1938, the terms of which were agreed to in writing by the defendants in intervention Walter B. Scoville and The Adamant Company. A true copy of said contract is annexed hereto marked Exhibit A, and by this reference incorporated herein.

V.

That pursuant to said contract, and at the time of the execution thereof, plaintiffs in intervention delivered to George Halverson the two cashier's checks described therein, each in the sum of \$2,500.00, and in a total aggregate amount of \$5,000.00.

VI.

That thereafter the defendant in intervention Walter B. Scoville applied to the Commissioner of Corporations for permission to transfer in escrow the two 1 per cent participating royalty interests provided by said contract to be assigned to the plaintiffs in intervention; that said application was executed by the defendant in intervention Walter B. Scoville, and joined in and consented to in writing by the defendant Treasure Company and the defendant in intervention The Adamant Company; and that a true copy of said application to the Commissioner of Corporations is annexed hereto marked Exhibit B, and by this reference incorporated herein.

VII.

That thereafter the Commissioner of Corporations issued his order consenting to the transfer in

escrow of said royalty interests, as requested in the aforesaid application, Exhibit B hereof; that thereafter, and on or about the 9th day of November, 1938, said George Halverson delivered said cashier's checks to G. de Bretteville, president of defendant Treasure Company; and that the proceeds of said checks, to wit, the sum of \$5,000.00, were used in placing on production said oil and gas well, being Treasure Well No. 8.

VIII.

That on or about the same date, to wit, the 9th day of [211] November, 1938, the defendant in intervention Walter B. Scoville executed and delivered assignments whereby he assigned to the plaintiffs in intervention Herschel Bullen and Mary H. Bullen, as joint tenants, a 1 per cent participating royalty in said well, and in the leases comprising the drill site therefor, and to the plaintiffs in intervention J. C. Hayward and Marian S. Hayward, as joint tenants, a 1 per cent participating royalty in said well, and in the leases comprising the drill site therefor; that the written assignments representing said royalty interests were delivered to and are held in escrow by the Commissioner of Corporations of the State of California; that under the terms of said assignments plaintiffs in intervention became and ever since have been entitled to an aggregate of 2 per cent of the proceeds of the sale of all oil, gas and other hydrocarbon substances produced from said Treasure Well No. 8, after deducting the necessary and reasonable costs of the operation of said well.

IX.

Plaintiffs in intervention are informed and believe that thereafter, and during the month of December, 1938, said well was placed on production, the money of these plaintiffs in intervention being used for that purpose, as aforesaid, and that said well was thereafter operated by the defendant Treasure Company, from time to time until on or about the 28th day of September, 1942, when the premises upon which it is located were condemned by the United States in that certain action pending in this Court, entitled United States vs. Certain Parcels of Land, No. 2454-B-Civil.

X.

Plaintiffs in intervention are informed and believe that during the period of its operation by defendant Treasure Company, said well produced large amounts of oil and gas, the exact amounts thereof and the times when produced being unknown to plaintiffs in intervention but being well known to said defendant; and that after [212] the payment of all expenses properly chargeable to plaintiffs in intervention there was a net profit to which the plaintiffs in intervention, as holders of said 2 per cent participating royalty interests, were entitled.

XI.

That no payments were ever made to the plaintiffs in intervention, as distributions of net profits upon the 2 per cent participating royalty interests held by the plaintiffs in intervention as aforesaid,

and that plaintiffs in intervention are entitled to an accounting from said defendant Treasure Company, and to a judgment requiring said defendant to pay to the plaintiffs in intervention their share of the net profits from the operation of said well, in accordance with the terms of the participating royalty assignments held by the plaintiffs in intervention.

For a second cause of action against the defendant Treasure Company, plaintiffs in intervention allege:

I.

Plaintiffs in intervention here repeat paragraphs I, II, III, IV, V, VI, VII, VIII and IX of their first cause of action, and incorporate the same herein by reference, as if the same had been specifically alleged in this second cause of action.

II.

That on the 11th day of July, 1949, in the condemnation proceedings in this Court hereinabove referred to, being United States vs. Certain Parcels of Land, No. 2454-B-Civil, a judgment was entered which, among other things, established a value of \$194,500.00 for the working interest in said Treasure Well No. 8, said sum representing the value of future production owned by the lessee and its assignees, and provided for the payment of said sum by the United States of America as just compensation for the taking of said property. [213]

III.

That thereafter, as a result of further proceedings held in said condemnation case, the Court entered judgment distributing said award of \$194,500.00 as follows:

Reconstruction Finance Corporation.	\$97,767.00
Adamant Company	47,925.00
Walter B. Scoville.....	30,672.00
Harry Wynn	11,502.00
H. Bullen and Mary H. Bullen.....	1,917.00
J. C. Hayward and Marian S. Hay- ward	1,917.00

IV.

That the aforesaid distribution award of \$97,767.00 to Reconstruction Finance Corporation was made to it as the successor in interest of the lessee, defendant Treasure Company, said defendant Treasure Company having assigned to Reconstruction Finance Corporation all of its right, title and interest in the award. That the judgment allocating said award of \$194,500.00 as aforesaid was affirmed by the Circuit Court of Appeals, except that payment of the awards made to all parties, other than the award of \$97,767.00 to Reconstruction Finance Corporation, was ordered to be withheld pending completion of this and other accounting suits. That the full amount of said award had theretofore been paid into the registry of this Court by United States of America, and that all of said money, with the exception of the award to Reconstruction Finance Corporation, is still held in the registry of

this Court, and that the portion thereof belonging to the parties to this action is subject to the disposition of the Court in this case.

V.

That plaintiffs in intervention are entitled to have distributed to them, as their share of said condemnation award, the sum of \$3,834.00, of which one-half, or \$1,917.00, is payable to Herschel Bullen and Mary H. Bullen, and the other one-half to J. C. [214] Hayward and Marian S. Hayward.

For a cause of action against the defendants in intervention Walter B. Scoville and the Adamant Company, and the defendant Treasure Company, being their third cause of action, plaintiffs in intervention allege:

I.

Plaintiffs in intervention here repeat paragraphs I, II, III, and IV of their first cause of action, and incorporate the same herein by reference, as if the same had been specifically alleged in this third cause of action.

II.

That the terms of said contract are likewise set forth in writing in an application to the Commissioner of Corporations wherein the defendant in intervention Walter B. Scoville applied for permission to transfer in escrow the two 1 per cent participating royalty interests hereinabove mentioned; that said application not only asked for permission to transfer said royalty interests in es-

crow, but also stated in paragraph II thereof that the funds advanced by the plaintiffs in intervention as aforesaid were to be repaid two for one out of production, i.e., that they were to receive the sum of \$10,000.00 from production, if any, for the \$5,000.00 invested; that said application was executed by the defendant in intervention Walter B. Scoville, and was joined in and consented to in writing by the defendant Treasure Company, and the defendant in intervention The Adamant Company.

III.

That thereafter, and on or about the 9th day of November, 1938, said George Halverson delivered said cashier's checks to G. de Bretteville, President of defendant Treasure Company, and that the proceeds of said checks, to wit, the sum of \$5,000.00, were used in placing on production said oil and gas well, being [215] Treasure Well No. 8.

IV.

Plaintiffs in intervention here repeat paragraph IX of their first cause of action, and incorporate the same herein by reference as if the same had been specifically alleged at this point.

V.

Plaintiffs in intervention are informed and believe that during the period of its operation by defendant Treasure Company, said well produced large amounts of oil and gas, the exact amounts thereof and the times when produced being un-

known to plaintiffs in intervention, but well known to said defendant; that 15 per cent of the gross proceeds of sale thereof amounted to more than \$10,000.00; that said sum should have been paid to plaintiffs in intervention by virtue of their contract with defendant in intervention Walter B. Scoville and others, Exhibits A and B hereof.

VI.

That no payments were ever made to the plaintiffs in intervention on account of the obligation to pay to them the sum of \$10,000.00 out of 15 per cent of the gross production from said well, as set forth in the contract, Exhibit A hereof, and in paragraph II of the application, Exhibit B hereof.

VII.

Plaintiffs in intervention here repeat paragraphs II, III and IV of their second cause of action, and incorporate the same herein by reference as if the same had been specifically alleged at this point.

VIII.

Plaintiffs in intervention are informed and believe that defendants in intervention Walter B. Scoville and The Adamant Company are insolvent, and that unless specific enforcement of the so-called two for one agreement, as set forth in Exhibit A hereof, [216] is had against said defendants, or one of them, if only one is liable, by applying a part of his, its or their share of the award for the working interest in said oil well to the satisfaction of

the obligation under said contract, Exhibit A hereof, plaintiffs in intervention will be irrevocably injured; and that plaintiffs in intervention have no adequate remedy at law.

Wherefore, plaintiffs in intervention pray as follows:

(1) That they may be allowed to have the benefit of any accounting proceedings heretofore had in this action, and such further accounting as may be required. That they have judgment against the defendant Treasure Company for such sums as may be found to be due to them as a result of such accounting, from the net proceeds of the operation of said well, Treasure Well No. 8, by defendant Treasure Company prior to the condemnation thereof, together with interest on such sums from the respective due dates thereof.

(2) That the Court order that there be paid to them their share of the award hereinabove set forth made by the Court in said condemnation case, being the value of their two 1 per cent participating royalty interests, to wit, the sum of \$1,917.00 to the plaintiffs in intervention Herschel Bullen and Mary H. Bullen, and the sum of \$1,917.00 to the plaintiffs in intervention J. C. Hayward and Marian S. Hayward.

(3) That the plaintiffs in intervention have judgment against the defendant Treasure Company, and the defendants in intervention Walter B. Scoville and The Adamant Company, for the sum of \$10,000.00, being the principal sum due upon the

said two for one agreement, together with interest upon the sums which should have been paid on account thereof out of 15 per cent of gross production from the respective dates when such payments should have been made, and that such judgment be specifically enforced against and satisfied [217] out of the share of the aforesaid award belonging to defendants in intervention Walter B. Scoville and The Adamant Company, now held in the registry of this Court as hereinabove set out.

(4) For such other and further relief as the Court may deem just.

Dated: January 29, 1953.

WILLIAMSON, HOGE & CURRY,
/s/ By FULTON W. HOGE,
Attorneys for plaintiffs in intervention Herschel
Bullen, Mary H. Bullen, J. C. Hayward and
Marian S. Hayward. [218]

Duly Verified. [219]

EXHIBIT "A"

Mr. George Halverson, September 27, 1938
Financial Center Building,
Los Angeles, California.

Dear Mr. Halverson:

In the Treasure Company-Walter B. Scoville matter, we are enclosing herewith Mr. Scoville's application to the Commissioner of Corporations of the State of California for consent to transfer in escrow certain securities from applicant to certain other persons, among which are listed: Herschel

Bullen and Mary H. Bullen as Joint Tenants, and not as Tenants in Common, with full and absolute Title and Rights of Survivorship to the Survivor for One per cent, and, J. C. Hayward and Marian S. Hayward as Joint Tenants, and not as Tenants in Common, with full and absolute Title and Rights of Survivorship to the Survivor for One per cent, the said Herschel Bullen, Mary H. Bullen, J. C. Hayward and Marian S. Hayward have signed the certification on page 4 of the said application.

We are also enclosing herewith First Security Bank of Utah, N.A., Logan Branch's Cashier Check No. 34-9314 in favor of Herschel Bullen and by him endorsed to you, in the sum of \$2,500.00, and First National Bank of Logan's Cashier Check No. 59770 in favor of J. C. Hayward and by him endorsed to you, in the sum of \$2,500.00, total \$5,000.00, which checks you are hereby authorized and instructed to deliver to the proper operating company, official or officials, for the uses and purposes in the above application therein mentioned, when the following has been complied with and agreed to between the parties hereto: [220]

First, when Walter B. Scoville and certain of his friends advance the necessary funds—these funds, \$5,000.00, to be included in the said necessary funds to be repaid two for one out of production—to fully comply with paragraph II of page 2 of said application herewith enclosed, it being understood and agreed to that the said two for one out of production is to be repaid out of the first 15% of gross production from the said well.

Second, when the said application herewith enclosed is fully executed by Walter B. Scoville, joined in and consented to by Treasure Company and J. Orville Seepie as Agent of Walter B. Scoville and The Adamant Company, and consented to by the Commissioner of Corporations of the State of California, and the said securities are transferred in escrow in favor of the undersigned, provided that consent by Treasure Company is hereby waived in the event you are unable to get it, and if in your judgment the well can be pushed to completion under present arrangements.

Third, in the event the well is a failure or is abandoned by the said Walter B. Scoville, et al., it is understood and agreed that the said Walter B. Scoville will give the undersigned comparable interests in Section 22, Township 19 North, Range 104 West, in Baxter Basin, Wyoming, properties owned and held by himself or The Adamant Company, the said funds to be repaid two for one from first returns from royalties or production, the said Walter B. Scoville or Adamant Company to give us a contract accordingly.

Fourth, we understand that we are not going into a partnership and do not want to, and want it further understood that the funds hereby advanced are to cover any and all liability on our part and that we are not to be held personally responsible for any debts or claims of any kind whatsoever, either existing or contracted in the future, without our consent.

If you will draw the necessary assignments and

contracts covering the above and render us bill for this service, we shall be [221] pleased to remit.

/ Yours very truly,

/s/ Herschel Bullen

HB:HB—Encl.

We agree to the foregoing.

The Adamant Company,
By Helen Scoville, Secretary
Walter B. Scoville
The Walter B. Scoville Company,
By Walter B. Scoville. [222]

EXHIBIT "B"

Before the Department of Investment, Division of
Corporations of the State of California, No.
63754 LA

In the Matter of the Application of Treasure Com-
pany for a permit authorizing it to sell and is-
sue its securities.

APPLICATION FOR CONSENT

To the Commissioner of Corporations of the State
of California:

Walter B. Scoville, the applicant herein, hereby
requests the issuance of an order by the Commis-
sioner of Corporations consenting to the transfer
in escrow of certain securities from applicant to
the persons hereinafter mentioned, and in support
of such application represents:

I.

That on April 20, 1938, the Commissioner of Corporations issued to Treasure Company a permit authorizing the sale and issuance of certain securities. Issuance Clause 2 of said permit authorizing the issuance to this applicant of 19 one per cent participating royalty interests in the premises described in the leases filed with the application as Exhibits "A" and "B" and covering approximately one (1) acre of land. Paragraph 6 of said permit authorizing the issuance to this applicant of $18\frac{1}{6}$ one per cent royalty interests in the premises covered by the leases filed with the application as Exhibits "C" and "D" and covering approximately fifteen (15) acres of land. That on said 20th day of April, 1938, an order was issued designating the Commissioner of Corporations as escrow holder under said permit. That pursuant to the provisions of said permit the royalty interests hereinabove referred to have [223] been duly issued to this applicant and deposited in escrow with the Commissioner of Corporations.

II.

The well described in the application of Treasure Company for a permit has been drilled to the depth of 6510 feet and is now ready for completion. In the opinion of all interested parties the cores and technical tests fully justify the completion and testing of this well. Applicant, Walter B. Scoville, desires to assist in completing said well and certain of his friends and business associates are willing

to advance the necessary funds, to be repaid two for one out of production. As an additional consideration or bonus for such advances, applicant desires to assign and transfer within escrow participating royalties in all of said leases to the following persons and in the following amounts:

Herschel Bullen and Mary H. Bullen as Joint Tenants, and not as Tenants in Common, with full and absolute Title and Rights of Survivorship to the Survivor—Percentage, One.

J. C. Hayward and Marian S. Hayward as Joint Tenants, and not as Tenants in Common, with full and absolute Title and Rights of Survivorship to the Survivor—Percentage, One.

III.

Applicant represents that all of said persons have known him for a number of years; that they are familiar with the condition of said well and with the plan of operation generally. He further represents that no public solicitation whatsoever has been made and that he has discussed the matter only with friends of long standing and with former business associates.

Wherefore, applicant, Walter B. Scoville, requests the issuance of an order consenting to the transfer in escrow of certain [224] participating royalty interests from him to the persons and in the amounts specified hereinabove, subject to the same terms and conditions as the royalty interests now in escrow in his name.

Walter B. Scoville, Applicant

State of Utah,
County of Cache—ss.

Walter B. Scoville, being by me first duly sworn, deposes and says: that he is the applicant in the foregoing Application; that he has read said Application and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

Walter B. Scoville

Subscribed and sworn to before me this 30 day of September, 1938.

Alta B. Clark,
Notary Public in and for the County of Cache,
State of Utah. Residing at Logan, Utah.

Treasure Company, the issuer of the securities involved in the foregoing Application, does hereby join in and consent to said Application.

Treasure Company,
[Seal] By I. Cowan, Secy. [225]

J. Orville Seepie, as agent of Walter B. Scoville and The Adamant Company, does hereby join in and consent to the foregoing Application and the transfer therein referred to.

The Adamant Company,
By Helen Scoville, Secretary
J. Orville Seepie

The undersigned individuals, named in the foregoing Application as prospective transferees of the participating royalty interests therein described, do hereby certify that they have individually known Walter B. Scoville for a long period of time; that they are familiar with the condition of and facts relating to the above mentioned well; that they are familiar with the general plan of operation and that they desire to have transferred to them within escrow participating royalty interests in the amounts set opposite their names hereinabove.

Herschel Bullen,

Mary H. Bullen

J. C. Hayward,

Marian S. Hayward [226]

Affidavit of Service by Mail attached. [227]

[Endorsed]: Filed Jan. 29, 1953.

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS IN INTERVENTION

Come now the defendants in intervention, the Adamant Company, a corporation, and Walter B. Scoville, and answer the complaint in intervention, as follows:

First Defense

The complaint in intervention fails to state a claim against defendants in intervention upon which relief can be granted. [228]

Second Defense

I.

Deny that the plaintiffs in intervention by reason of any contract, or otherwise, advanced the sum of \$5,000.00, or any other sum of money, for the benefit of Walter B. Scoville or the Adamant Company; but allege that any moneys advanced or paid by Herschel Bullen and J. C. Hayward to the Treasure Company was for the sole benefit of said plaintiffs in intervention and as an investment in an oil venture.

II.

Admit that Walter B. Scoville and the Adamant Company were interested in the drilling of Treasure Well No. 8.

III.

Deny that the terms of said alleged contract, marked Exhibit A, required the Adamant Company or Walter B. Scoville to issue any participating royalty interest to Herschel Bullen or J. C. Hayward or to pay the sum of \$10,000.00, or any sum whatsoever, to the plaintiffs in intervention out of the first fifteen per cent of gross production from said well, or out of any production from said well.

Allege that said purported contract, plaintiffs in intervention Exhibit A, constituted a letter addressed to their attorney Mr. George Halverson, directing and authorizing said George Halverson to draw the necessary assignments and contracts covering the above matters and to render a bill for his services in that connection, and that said plaintiffs in intervention would remit for his services.

And allege further that, as set forth on page 3 of Exhibit A, the words "we agree to the foregoing" was a statement that said George Halverson should prepare all necessary assignments and contracts covering the rights of the plaintiffs in intervention; and that said statement did in no manner bind the Adamant Company or Walter B. Scoville to pay any funds out of production or to do [229] anything whatsoever under said contract except to agree that said George Halverson should draw the necessary assignments and contracts to cover the rights of Messrs. Bullen and Hayward.

Allege further that Walter B. Scoville transferred to Messrs. Bullen and Hayward and their respective wives a one per cent participating royalty interest each, which constituted, so far as **Adamant** Company and Walter B. Scoville are concerned, a full satisfaction of the investment of \$5,000.00.

And allege further that Adamant Company and Walter B. Scoville never operated said Treasure Well No. 8, never received any moneys from the production of said Treasure Well No. 8, but that said well was operated entirely by Treasure Company and one G. de Bretteville from the time it was placed on production and down to the present day. And that said Treasure Company and G. de Bretteville sold and received payment for all the production from said well.

IV.

Deny that said Exhibit A to the complaint in intervention constitutes a contract between the plaintiffs in intervention and the defendants in in-

tervention, Walter B. Scoville and the Adamant Company or either of them.

V.

Allege that defendants in intervention are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph V of the first cause of action, and deny each and every allegation contained therein.

VI.

Admit that Walter B. Scoville applied to the Commissioner of Corporations as set forth in Exhibit B to the complaint in intervention; but deny that Exhibit A constituted a contract.

VII.

Admit that the Commissioner of Corporations issued his [230] order consenting to the transfer in escrow of said royalty interest.

Allege that they are without knowledge or information sufficient to form a belief as to the truth of the further allegations contained in paragraph VII of the first cause of action.

And deny that the said George Halverson delivered any cashier's checks to G. de Bretteville or that proceeds of said checks were used in placing on production said Treasure Well No. 8.

VIII.

Admit paragraph VIII of the first cause of action of the complaint in intervention.

IX.

Admit that Treasure Well No. 8 was placed on production in December, 1938 and that said well was thereafter operated by the defendant Treasure Company until September 28, 1942, at which latter date the premises were condemned by the United States Government in behalf of the Reconstruction Finance Corporations.

X.

Admit paragraph X of said first cause of action of said complaint.

XI.

Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph XI of the first cause of action, and these defendants in intervention deny that no payments were ever made to the plaintiffs in intervention as distribution of said profits upon the two per cent participating royalty interest; and allege, upon information and belief, that the plaintiffs received the sum of \$3,500.00 for their two per cent participating royalty interest.

Third Defense

These defendants in intervention admit, deny, and allege as follows: [231]

I.

Admit that the defendants in intervention, together with one Joe Seeple and Harry Wynn, and no other parties, obtained a jury verdict establishing a value of \$194,500.00 for the working interests of eighty and six-tenths per cent in said Treasure

Well No. 8, and that said sum represented the value of future production owned by the said working interests, and that said verdict, entered July 11, 1949, provided for the payment of said sum by the United States of America as just compensation for the taking of said property.

II.

Admit paragraph III of said second cause of action.

III.

Admit paragraph IV of said second cause of action, except that these defendants in intervention deny that any portion of the moneys held by the registry of the Court is subject to the disposition of the Court in this case.

IV.

Admit paragraph V of said second cause of action in the complaint of intervention.

Fourth Defense

I.

In answer to the third cause of action in the complaint of intervention, these defendants in intervention re-allege paragraphs answering paragraphs I, II, III and IV of the first cause of action and incorporate the same herein by reference as if the same had been specifically alleged in this fourth defense.

II.

Deny paragraph II of said third cause of action, and allege that there is no contract binding upon these defendants in [232] intervention.

Admit that Exhibit B is a correct copy of the application filed with the Commissioner of Corporations.

III.

For lack of information and belief, these defendants in intervention deny that on the 9th day of November, 1938, or at any other time, Mr. George Halverson delivered any cashier's checks to G. de Bretteville, president of defendant Treasure Company, and deny that the proceeds of said checks, in the sum of \$5,000.00 or any other sum, were used in placing on production said Treasure Well No. 8.

IV.

The defendants in intervention re-allege paragraph IX of their second defense in answer to paragraph IX of the first cause of action.

V.

Defendants in intervention are informed, and believe and upon such information and belief allege, that Treasure Company and G. de Bretteville produced from Treasure Well No. 8 oil and gas for which they received the approximate sum of \$205,411.69; and deny that any portion of said sum was payable to plaintiffs in intervention by virtue of any contract with the defendants in intervention or either of them.

VI.

Defendants in intervention re-allege paragraph XI of their second defense and incorporate same in

answer to paragraph VI of the third cause of action of the complaint herein.

VII.

Deny that the defendants in intervention are insolvent and allege that there is no Two-for-one agreement between the plaintiffs in intervention and the defendants in intervention, and hence that plaintiffs in intervention have no cause of action [233] against these defendants in intervention or either of them.

Fifth Defense

The right of action set forth in the complaint did not accrue within six years prior to the filing of the complaint in intervention.

Sixth Defense

The defendants in intervention allege that any cause of action which plaintiffs in intervention may have upon their alleged contract, marked Exhibit A and attached to their complaint, is barred by reason of the Statute of Limitations of the State of California, being Section 337 of the Code of Civil Procedure of said State, and hence the complaint in intervention is without merit.

Wherefore, defendants in intervention pray that plaintiffs in intervention take nothing by reason of their complaint herein, and that defendants in intervention have judgment for their costs and disbursements herein expended and for such other and

further relief as to the Court may seem just and proper.

Dated: February 4, 1953.

/s/ LELAND J. ALLEN,

Attorneys for Defendants in Intervention, The
Adamant Company and Walter B. Scoville

Duly Verified. [235]

Affidavit of Service by Mail attached. [236]

[Endorsed]: Filed February 10, 1953.

[Title of District Court and Cause.]

DECISION

The above entitled cause heretofore tried and submitted is hereby decided as follows:

1. Upon their complaint plaintiffs, Walter Scoville and The Adamant Company, are entitled to recover from the defendants, G. de Bretteville and Treasure Company, the sum of \$13,000.00, admittedly advanced by Scoville. On the accounting asked by the plaintiffs in the complaint the court finds that, an accounting having been ordered and made, the defendants have accounted for all monies received by them and that no funds in which the plaintiffs or any of the other parties to the action have any interest are now in the possession of the defendants or either of them.

2. Plaintiffs in intervention, Herschel Bullen and Mary H. Bullen, and J. C. Hayward and Marian

S. Hayward, or any of them are not entitled to recover from the defendants [242] in intervention, Treasure Company, Walter Scoville and The Adamant Company, or any of them the sum of \$10,000.00 or any part thereof by reason of the so-called "two-for-one agreement" dated September 27, 1938, and that said agreement is barred as to all the plaintiffs in intervention by the provisions of Section 337 of the California Code of Civil Procedure.

Each side shall pay their own costs. Formal findings and judgment to be prepared by Messrs. Nicholas and Mack, counsel for the defendants, under Local Rule 7.

Comment

As a guide to counsel in preparing findings the Court will state in what follows its conclusions upon the main issues involved. It should be stated at the beginning that, leaving aside any question of the applicability of the doctrine of the law of the case, I am satisfied that *United States vs. Adamant Co.*, 1952, 9 Cir., 197 F.2d 1, clearly states the law upon the questions there discussed, and that the adjudication of the matters therein contained, such as the nature of the "two-for-one agreement," the apportionment of the award and the like, is correct. More, the briefs of counsel challenging, in an indirect manner, the conclusion that the "two-for-one agreement" did not assign an interest in the production of the well, but was merely a personal obligation, has not been shaken.

That conclusion was stated briefly in the opinion in this manner:

"We dispose of the claim arising from the 'Two-to-One Agreement' by stating that the trial court was correct in holding it to be a personal undertaking on the part of Scoville which gave the Bullens and Haywards no interest [243] in the well or production from it." (p. 8)

This determination is sustained by the rulings of the State Courts of California which are set forth in *United States vs. Adamant*, *supra*, pp. 5-6, 8-13, which further study has confirmed.

So I find, after a full study of the record and briefs, that the plaintiffs in intervention had only a personal claim against Scoville for double the amount of the \$5,000.00, and that the agreement to pay that amount was merely an agreement to pay when the returns from the first 15% of production came in. It was not a charge upon the production of the well or an assignment or hypothecation of such percentage. This conclusion is re-enforced by the contemporaneous letter written by Dr. Hayward, August 22, 1939, indicating the intention to consider the money advanced as a personal obligation of Scoville. And even the letter from the attorney Charles Franklin Johnson, dated September 26, 1938, speaks of it as a "contingency," to avoid usury. In Bullen's letter to their attorney, Halverson, dated September 27, 1938, which is the basis of the claim, any personal liability which might go with ownership of production is rejected. The obligation being personal in nature and the letter being dated September 27, 1938, the action on it was barred when the Complaint in intervention was filed

on January 30, 1953, if we apply to it the maximum limitation applicable,—four years. (California Code of Civil Procedure, Sec. 337.) Much is made of the fact that Judge Peirson Hall, when granting leave to intervene, expressed the view that the action was not barred by the statute of limitation because the statute did not begin to run until the fund out of which the money was to be repaid came into being. This conclusion was based upon the allegations of the tendered complaint in intervention that the agreement was a conveyance [244] of an interest in the production of oil.

The rules relating to intervention (Federal Rules of Civil Procedure, Rule 24 are construed liberally. Judge Hall's Order dated October 30, 1952, is not a final determination either as to the nature of the agreement or as to the application of the statute of limitations. The views expressed related to the sufficiency of the allegations of the tendered complaint in intervention. Judge Hall did not intend to bind the trier of fact, whether himself or anyone else, to a final determination of the questions raised by answer to the complaint which could not be made until the case was tried on the merits. Before deciding this matter the writer consulted Judge Hall, who agrees with this interpretation of his Order.

The final determination announced that the undertakings towards the Bullens and Haywards by Scoville and the Adamant Company were personal obligations which are barred by the statute, is, of course, mine. In conjunction with this matter, I am of the view that, while the plaintiffs are entitled

to the repayment of the sum of \$13,000.00 advanced by Scoville (payment of which is admitted in the record and is reflected in the audit), the "two-for-one agreement," which was an inducement for outsiders to join the venture did not apply to Scoville and Adamant. I realize that in certain oil ventures the risk may be so great that persons advancing money for the completion of a well might make an onerous contract which transferred to them interests in the production and also repaid them the money manifold. However, in order to find such contract in favor of persons in the original venture and connected with its management there should be before the court clear and convincing proof from independent sources. This is lacking here.

By the same token, the failure of Scoville [245] and Adamant to pay their prorata share of the cost of production does not call for a forfeiture of their interests in the venture. The Judgment in the Superior Court—which has been referred to as the "Vickers Judgment,"—is dated November 27, 1940, and made the following adjudication:

"That the contract dated April 5, 1938, a copy of which is attached to defendant's answer, and the addendum thereto, a copy of which is set forth in plaintiffs' complaint, were terminated as of January 31, 1939, save and except that the plaintiffs, The Adamant Company and Walter B. Scoville, and their assigns, are entitled to retain their respective interests in said lease hereinbefore described upon which said well 'Treasure No. 8' is drilled, to wit, twenty-five per cent (25%) therein to The Adamant

Company, a corporation, and nineteen per cent (19%) therein to Walter B. Scoville, both of which interests are subject to any Assignment made and subject to their pro rata share of the completion, operation and maintenance costs and charges of said well."

It is not disputed that the monies were to be reimbursable advances for operating costs. Ultimately, the operating company paid them out of the income from production. An abandonment of a joint venture agreement may be inferred from the acts of parties and their failure to perform their obligations. The leading California case on the subject was one which I tried on the Superior Court, Middleton vs. Newport, 1936, 6 C(2) 57, 62, and which has been followed consistently: See, Fooshee vs. Sunshine, 1950, 96 C.A.(2) 336, [246] 343; Richards vs. Plumbe, 1953, 116 C.A.(2) 132, 138; Aaron vs. Puccinelli, 1953, 121 C.A.(2) 675, 678-679.

The "Vickers Judgment" confirmed the rights of Scoville and Adamant to certain percentages in the lease. We cannot consider the conditions attached, the advance of operating expenses,—which were at all times repayable,—a condition subsequent, the non-performance of which would warrant a forfeiture of a vested interest. Equity abhors forfeitures. And the parties themselves not having chosen to spell out the penalty for failure to advance monies for operation, the only consequence when the operation was successful is to surcharge the enterprise with the expenditures. This, of course, has actually been done. And we are not, in

the circumstance, bound to follow the cases relied on by the defendants and which consider the failure to perform certain obligations as ground for forfeiture. The conditions before us were not of that character. After all, the only detriment which California law attaches for failure to perform a contract to pay money is payment of interest. (California Civil Code, Sec. 3302)

So I conclude that both under the doctrine of res judicata and on the facts in the case, the interests of Scoville and Adamant in the venture are as stated in the "Vickers Judgment" and as recognized by Judge Westover in the condemnation case.

As to the accounting, I accept and agree with the views expressed by Judge Hall who ordered it, as to the matters brought before him. As to the additional items left open, relating to certain allowances, as to which evidence was presented from the record in the prior case, I am of the view that they were proper charges. In sum, I conclude that the accounting does not show any improper charges or withholding [247] or misapplication of funds. It follows that, in all respects, the defendants have fully accounted to the owner of participating interests for the monies received and expended during the operation and up to and including the acquisition of the property by the Government through condemnation proceedings and since. And I so find.

In view of the fact that the Court of Appeals in remanding the condemnation case, stated that the apportioned amounts of the award might be depleted by the findings in this case, it is evident from

the conclusion reached, and I so find, that the amounts to be received by the litigants now before the court from the award in the condemnation proceeding are those set forth in the Judgment of Judge Westover dated October 23, 1950, apportioning the funds, and affirmed by the Court of Appeals. The proper amounts to be received without any deductions are:

Adamant Company: 25% or \$47,925.00.

Walter B. Scoville: 16% or \$30,672.00.

H. Bullen and Mary H. Bullen: 1% or \$1,917.00.

J. C. Hayward and Mary S. Hayward: 1% or \$1,917.00.

The Judgment for \$13,000.00 in favor of Scoville and Adamant is, of course, a personal judgment against de Bretteville and Treasure Company. This matter is adverted to so that proper findings may be prepared as to this matter so as to avoid further controversy on the subject when application is made in the condemnation suit before Judge Westover for the distribution of funds in accordance with the mandate of the Court of Appeals.

Dated this 11th day of April, 1955.

/s/ LEON R. YANKWICH,

Chief U.S. District Judge [248]

Appearances: For the Plaintiffs: Leland J. Allen, Esquire, Los Angeles, California. For the Plaintiffs in Intervention: Hoge & Perry, By: Fulton W. Hoge, Esquire, Los Angeles, California. For the

Defendants: John H. Rice, Esquire, and Max G. Kolliner, Esquire, Los Angeles, California. [249]

[Endorsed]: Filed April 11, 1955.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled case came on regularly for trial before the Court without a jury, plaintiffs Walter B. Scoville and The Adamant Company appearing by their attorney, Leland J. Allen; plaintiffs-in-intervention Herschel Bullen, Mary E. Bullen, J. C. Hayward and Marian B. Hayward, appearing by their attorneys Hoge and Perry and Fulton W. Hoge; and defendants G. de Bretteville and Treasure Company appearing by their attorneys, Nicholas & Mack and John H. Rice and Max G. Kolliner; and evidence, both oral and documentary, having been introduced by and on behalf of all parties appearing and briefs having been filed by all parties appearing and the case having been submitted, the Court now makes its Findings of Fact and Conclusions of Law as follows: [250]

Findings of Fact

I.

Plaintiff Walter B. Scoville is a citizen and resident of the State of Utah and Plaintiff The Adamant Company is a corporation organized and exist-

ing under the laws of the State of Utah. Defendant G. de Bretteville is a citizen and resident of the State of California and defendant Treasure Company is a corporation organized and existing under the laws of the State of California. The amount in controversy, exclusive of interest and costs, exceeds the sum of Three Thousand and no/100 Dollars (\$3,000.00).

II.

With reference to the controverted allegations in Paragraph III and in Paragraphs V to XII, inclusive, in the First Cause of Action of plaintiffs' complaint which raise sundry issues as to defendant Treasure Company's accountability to plaintiffs for moneys received in the operation of Treasure Well No. 8, the report of the Special Master appointed by this Court before whom a formal accounting was conducted, is adopted by this Court insofar as said report shows that there were no improper charges or withdrawals or misapplication of funds by defendant Treasure Company or by defendant G. de Bretteville during the period covered by said accounting. As to certain items expressly left open by the Special Master in his report relating to certain allowances as to which evidence was presented during the trial of this case, all charges shown in defendant Treasure Company's said accounting are in accordance with good accounting practice and are proper charges.

III.

The judgment filed in the Superior Court of the State of California, in and for the County of Los

Angeles, on November 27, 1940, in Case No. 441,484 (hereinafter called the "Vickers Judgment"), includes the following adjudication in Paragraph III:

"That the contract dated April 5, 1938, a copy of which is attached to defendant's answer, and the addendum thereto, a copy of which is set forth in plaintiffs' complaint, were terminated as of January 31, 1939, save and except that the plaintiffs, The Adamant Company and Walter B. Scoville, and their assigns, are entitled to retain their respective interests in said lease hereinbefore described upon which said well 'Treasure No. 8' is drilled, to wit, twenty-five per cent (25%) therein to The Adamant Company, a corporation, and nineteen per cent (19%) therein to Walter B. Scoville, both of which interests are subject to any Assignments made and subject to their pro rata share of the completion, operating and maintenance costs and charges of said well."

IV.

Plaintiff Walter B. Scoville did advance the sum of \$13,000 to defendant Treasure Company for the completion of Treasure Well No. 8, and said Walter B. Scoville has received back no part of said funds so advanced. These funds were advanced prior to completion of said well on or about December 7, 1938.

V.

Neither defendant Treasure Company nor defendant G. de Bretteville offered any "2 for one agreement" to either plaintiff Walter B. Scoville or to plaintiff The Adamant Company on any funds ad-

vanced by plaintiffs, or either of them, for completion of Treasure Well No. 8.

VI.

Moneys advanced for operating costs of Treasure Well No. 8 were advanced on a reimbursable basis and such advances ultimately were paid by defendant Treasure Company out of proceeds from [252] the production of said well.

VII.

Defendant Treasure Company and plaintiff Walter B. Scoville and plaintiff The Adamant Company failed to provide by contract the penalty to be applied for failure to advance moneys for operation of Treasure Well No. 8 in accordance with contractual commitments.

VIII.

The amounts apportioned to plaintiffs Walter B. Scoville and The Adamant Company and to plaintiffs-in-intervention Herschel Bullen, Mary E. Bullen, J. C. Hayward and Marian B. Hayward, as set forth in the judgment entered by Judge Westover on October 23, 1950, in the Federal condemnation distribution trial designated No. 2454-HW Civil, are as follows:

The Adamant Company: 25% or \$47,925.00.

Walter B. Scoville: 16% or \$30,672.00.

Herschel Bullen and Mary E. Bullen: 1% or \$1,917.00.

J. C. Hayward and Marian B. Hayward: 1% or \$1,917.00.

There are no off-sets or charges to be made against the amounts so apportioned as a result of this lawsuit.

IX.

On or about the 27th day of September, 1938, plaintiffs-in-intervention Herschel Bullen and J. C. Hayward entered into a certain contract in writing with defendant-in-intervention Walter Scoville whereby said plaintiffs-in-intervention agreed to advance the sum of \$5,000.00 for the purpose of completing and bringing into production said Treasure Well No. 8.

X.

Under the terms of said contract, dated September 27, 1938, it was agreed that plaintiffs-in-intervention should receive the following:

(1) The sum of \$10,000.00, being the repayment, two for one, [253] on the terms and conditions stated in the contract, of the \$5,000.00 to be advanced by the plaintiffs-in-intervention.

(2) A participating royalty interest in said well amounting to 2% in the aggregate, a 1% royalty to go to Herschel Bullen and Mary H. Bullen, and a 1% royalty to go to J. C. Hayward and Marian S. Hayward.

XI.

Said contract is set forth in a letter from plaintiff-in-intervention Herschel Bullen to George Halverson, dated September 27, 1938, the terms of which were agreed to in writing by defendant-in-

intervention Walter B. Scoville. Defendant Treasure Company was not a party to said agreement, and was not bound thereby. A true copy of said letter, and of the agreement endorsed thereon by defendants-in-intervention Walter B. Scoville and The Adamant Company, is attached to the complaint-in-intervention herein and marked Exhibit A, and a true copy of the application to the Commissioner of Corporations referred to in said letter and relating to the assignment of said participating royalty interests to plaintiffs-in-intervention, is attached to the complaint-in-intervention herein and marked Exhibit B.

XII.

Pursuant to said agreement plaintiffs-in-intervention advanced the sum of \$5,000.00, and said money was used as part of the funds by which said oil well, Treasure Well No. 8, was placed on production, and plaintiffs-in-intervention have fully performed all terms of said agreement by them to be performed. No payments were ever made to plaintiffs-in-intervention on account of the obligation to pay to them the sum of \$10,000.00, as set forth in said contract, Exhibit A of the complaint-in-intervention.

XIII.

It was the intention of the parties to said contract that payment of said sum should be made to the plaintiffs-in-intervention when and if said well was placed on production, and from time to [254] time thereafter, in an amount equal to 15% of the

gross production thereof, until the sum of \$10,000.00 had been paid. It was the intention of the parties to said contract that the obligation to pay said sum of \$10,000.00 should be a charge upon the production of the well, or upon any interest therein of the obligors Walter B. Scoville or The Adamant Company, but it was their intention that the obligation to pay said sum of \$10,000.00 should be the personal obligation of said Walter B. Scoville only.

XIV.

The defendant Treasure Company has fully accounted to plaintiffs-in-intervention for their respective shares of the net production from said well.

XV.

Except as herein found, other allegations found in the answer or other pleadings are found not to be true.

Conclusions of Law

I.

This matter involves a controversy between citizens and residents of different states and, there being the requisite jurisdictional amount in controversy, this Court has jurisdiction of the cause by reason of diversity of citizenship.

II.

In all respects defendants G. de Bretteville and Treasure Company have fully accounted to plain-

tiffs Walter B. Scoville and The Adamant Company as owners of participating royalty interests in Treasure Well No. 8 for all moneys received and expended during the operation of said well both prior to and subsequent to the date when the Government of the United States seized the property upon which the said well is located in condemnation proceedings.

III.

The Vickers Judgment is *res adjudicata* on the issue of ownership by plaintiffs Walter B. Scoville and The Adamant Company of their respective participating royalty interests in the lease upon which Treasure Well No. 8 is located. [255]

IV.

The Vickers Judgment confirmed the right of plaintiff Walter B. Scoville to ownership of 19% participating royalty interest in the lease upon which Treasure Well No. 8 is located, which interest has been reduced to 16% by certain assignments made by said Scoville. The Vickers Judgment confirmed the right of plaintiff The Adamant Company to ownership of 25% participating royalty interest in said lease.

V.

Whatever rights plaintiff Walter B. Scoville and plaintiff The Adamant Company enjoyed under a certain contract with defendant Treasure Company dated April 5, 1938, were merged as a matter of law in the Vickers Judgment.

VI.

The failure of plaintiff Walter B. Scoville and of plaintiff The Adamant Company to pay their pro rata share of the costs of production of Treasure Well No. 8 does not call for a forfeiture of their interests in the venture. Nonperformance of the conditions set forth in Paragraph III of the Vickers Judgment does not warrant a forfeiture of vested interests.

VII.

The obligation of Walter B. Scoville as a party to said agreement of September 27, 1938, to pay to the plaintiffs-in-intervention the sum of \$10,000.00, was a personal obligation of said Walter B. Scoville, and such obligation did not give to the plaintiffs-in-intervention, or to any of them, any interest in or charge upon the production of said well, or any interest therein of said defendants-in-intervention, whether by way of security for payment of said sum of \$10,000.00 or otherwise, and that said obligation is barred by the statute of limitations of the State of California, specifically by the provisions of § 337 of the Code of Civil Procedure of said state. [256]

VIII.

Defendants Treasure Company and G. de Bretteville are indebted to plaintiffs Walter B. Scoville and The Adamant Company for the \$13,000 advanced for completion of Treasure Well No. 8.

Let judgment be entered accordingly.

Dated this 24th day of May, 1955.

/s/ LEON R. YANKWICH,

United States District Judge [257]

[Endorsed]: Lodged May 16, 1955. Filed May 24, 1955.

In the United States District Court for the Southern District of California, Central Division

No. 1761-Y.—Civil

WALTER B. SCOVILLE and THE ADAMANT
COMPANY, a corporation, Plaintiffs,

vs.

G. de BRETTEVILLE and TREASURE COM-
PANY, a corporation, Defendants.

JUDGMENT

The above-entitled action came on for trial before the Court without a jury, plaintiffs Walter B. Scoville and The Adamant Company appearing by their attorney Leland J. Allen, and plaintiffs-in-intervention Herschel Bullen, Mary H. Bullen, J. C. Hayward and Marian B. Hayward, appearing by their attorneys Hoge & Perry and Fulton W. Hoge, and defendants G. de Bretteville and Treasure Company appearing by their attorneys Nicholas & Mack and John H. Rice and Max G. Kolliner, and testimony having been offered and briefs filed by all parties and the Court, after due deliberation

having rendered its decision, and on the 24th day of May, 1955, made and filed its Findings of Fact, Conclusions of Law and Order for Judgment;

Now, Therefore, pursuant thereto, it is ordered and adjudged, as follows, to wit: [258]

I.

Plaintiffs, Walter B. Scoville and The Adamant Company, have judgment against defendants, G. de Bretteville and Treasure Company, in the sum of Thirteen Thousand and no/00 Dollars (\$13,000.00), constituting reimbursement to plaintiffs for moneys advanced by them to defendants as part of the completion costs of Treasure Well No. 8.

II.

Neither plaintiffs-in-intervention, Herschel Bullen, Mary H. Bullen, J. C. Hayward and Marian S. Hayward, nor any of them, are entitled to recover anything from defendants-in-intervention G. de Bretteville, Treasure Company, Walter B. Scoville and The Adamant Company, or any of them.

III.

Defendants G. de Bretteville and Treasure Company have accounted for all moneys received by them in the operation of Treasure Well No. 8 and no funds derived from the operation of said well in which plaintiffs, or either of them, or plaintiffs-in-intervention, or either of them, have any interest are now in the possession of defendants, or either of them.

IV.

Plaintiffs, plaintiffs-in-intervention and defendants shall each pay their respective costs of suit.

Dated this 24th day of May, 1955.

/s/ LEON R. YANKWICH,

Judge of the U. S. District

Court

[259]

Affidavit of Service by Mail attached. [260]

[Endorsed]: Lodged May 16, 1955. Filed and Entered May 24, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL OF PLAINTIFFS-IN-INTERVENTION

Notice Is Hereby Given that Herschel Bullen, Mary H. Bullen, J. C. Hayward and Marian S. Hayward, hereby appeal to the Court of Appeals for the Ninth Circuit from that certain [261] judgment entered in the above entitled action on May 24, 1955.

Dated: June 21, 1955.

HOGUE & PERRY,

/s/ By FULTON W. HOGUE,

Attorneys for Herschel Bullen, Mary H. Bullen, J. C. Hayward and Marian S. Hayward. [262]

[Endorsed]: Filed June 22, 1955.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DESIGNATE
RECORD AND DOCKET APPEAL

Good cause appearing therefor,

It Is Ordered that the time for the Plaintiffs in Intervention Hershel Bullen, Mary H. Bullen, J. C. Hayward and Marian S. Hayward, to designate and docket their record on appeal in the above entitled proceeding, under the Notice of Appeal filed by said Plaintiffs in Intervention on June 22, 1955, be [263] and the same is hereby extended to September 20, 1955.

Dated this 7th day of July, 1955.

/s/ LEON R. YANKWICH,
Chief Judge of the U. S. Dis-
trict Court [264]

[Endorsed]: Filed July 7, 1955.

[Title of District Court and Cause.]

DEFENDANTS NOTICE OF APPEAL

Notice Is Hereby Given that G. de Bretteville and Treasure Company, hereby appeal to the Court of Appeals for the Ninth Circuit from that certain judgment entered in the above-entitled action on May 24, 1955.

Dated: July 11, 1955.

NICHOLAS & MACK,

/s/ By JOHN H. RICE,

Attorneys for Defendants G. de Bretteville and
Treasure Company. [265]

[Endorsed]: Filed July 12, 1955.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL BY THE APPELLANTS HERSCHEL BULLEN, MARY H. BULLEN, J. C. HAYWARD AND MARIAN S. HAYWARD PURSUANT TO RULE 75(d), FEDERAL RULES OF CIVIL PROCEDURE

Come now the appellants, Herschel Bullen, Mary H. Bullen, J. C. Hayward and Marian S. Hayward, and, pursuant to Rule 75(d), Federal Rules of Civil Procedure, state the following points upon which they will rely in the prosecution of the appeal here-

tofore taken by them in said cause from the Judgment entered by this [269] Court on May 24, 1955:

I.

The Court erred in its finding, as set forth in its Finding VIII, that there are no charges to be made against the amounts apportioned to The Adamant Company or Walter B. Scoville in the Federal condemnation distribution trial, designated No. 2454-HW Civil; and in failing to find that the obligation of Walter B. Scoville and The Adamant Company to pay to these appellants the sum of \$10,000.00, with interest, constituted a charge upon the portions of the condemnation award allotted to The Adamant Company and Walter B. Scoville in said trial, and set forth in said Finding VIII.

II.

The Court erred in its finding (Finding XIII) that it was not the intention of the parties to the agreement under which said \$10,000.00 was to be paid that the obligation to pay said sum should be a charge upon the production of the well, or any rights therein of the obligors Walter B. Scoville or The Adamant Company, and in finding that it was their intention that the obligation to pay said sum of \$10,000.00 should be the personal obligation of Walter B. Scoville only.

III.

The Court erred in finding, if it did so find, that said agreement was made only by Walter B.

Scoville, and not *be* Walter B. Scoville and The Adamant Company.

IV.

The Court erred in its conclusion of law (Conclusion VII) in concluding that the obligation of Walter B. Scoville as a party to the agreement of September 27, 1938, to pay the plaintiffs in intervention the sum of \$10,000.00, was a personal obligation of Walter B. Scoville only, and that such obligation did not give the plaintiffs in intervention, or any of them, any interest in [270] or charge upon the production of said well, whether by way of security for the payment of said sum of \$10,000.00 or otherwise; and in concluding that said obligation is barred by the statute of limitations of the State of California, specifically by the provisions of Section 337 of the Code of Civil Procedure of said state.

HOGUE & PERRY,

/s/ By FULTON W. HOGUE,

Attorneys for Appellants Herschel Bullen, Mary H. Bullen, J. C. Hayward and Marian S. Hayward. [271]

Affidavit of Service by Mail attached. [272]

[Endorsed]: Filed July 27, 1955.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
RECORD AND DOCKETING APPEAL

On motion of defendants appearing through their counsel ex parte, the Court being fully advised, it is ordered that the time for filing the record on appeal with the United States Court of Appeals for the Ninth Circuit, and for docketing therein the appeal taken by defendants by notice of appeal filed July 12, 1955, is extended to September 21, 1955, pursuant to Rule 73(g) of the Federal Rules of Civil Procedure.

Dated: August 9, 1955.

/s/ PEIRSON M. HALL,

United States District Judge [276]

[Endorsed]: Filed August 9, 1955.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL BY
APPELLANTS G. de BRETTEVILLE AND
TREASURE COMPANY

Come Now the Appellants G. de Bretteville and Treasure Company, a corporation, and pursuant to Rule 75(b), Federal Rules of Civil Procedure, state the following points upon which they will rely in the prosecution of the appeal heretofore taken by them in said cause from the Judgment entered by this Court on May 24, 1955.

I.

The Court erred in its finding (Finding IV) that Walter [279] B. Scoville did advance the sum of \$13,000 to Treasure Company for the completion of Treasure Well No. 8, and that such funds were advanced prior to completion of said Well on or about December 7, 1938.

II.

The Court erred in failing to find that there is no evidence in this lawsuit which supports the allegations set forth in Paragraphs IV and V of the Second Cause of Action of the Complaint filed herein, that Walter B. Scoville advanced to Treasure Company and to G. de Bretteville between May 15, 1938 and December 15, 1938, the sum of \$13,000 for placing said Treasure Well No. 8 on production, or otherwise, or at all.

III.

The court erred in failing to find that G. de Bretteville was not a party to the joint venture for the development of said Treasure Well No. 8.

IV.

The Court erred in failing to find that there is no evidence in this lawsuit that G. de Bretteville has any liability to Treasure Company for personally withholding any moneys which are the property of Treasure Company.

V.

The Court erred in its Conclusion of Law (Conclusion VIII) that Treasure Company and G. de Bretteville are indebted to Walter B. Scoville and

to The Adamant Company for \$13,000 advanced for completion of Treasure Well No. 8.

VI.

The Court erred in failing to conclude as a matter of law that G. de Bretteville is not liable for any debts of Treasure Company to Walter B. Scoville or The Adamant Company, if such indebtedness exists, on the ground of alter ego or as a joint adventurer, or otherwise, or at all. [280]

VII.

The Court erred in failing to conclude as a matter of law that the stipulation of counsel entered into in open Court in a previous state court action, as set forth in Paragraph II of the Second Cause of Action in the Complaint herein, does not constitute an admission in this lawsuit that either G. de Bretteville or Treasure Company owes to Walter B. Scoville or to The Adamant Company the sum of \$13,000, or any part thereof.

/s/ By JOHN H. RICE,
Attorneys for Appellants G. de Bretteville and
Treasure Company [281]

Affidavit of Service by Mail attached. [282]

[Endorsed]: Filed August 30, 1955.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
RECORD AND DOCKETING APPEAL

On motion of defendants appearing through their counsel ex parte, the Court being fully advised, it is ordered that the time for filing the record on appeal with the United States Court of Appeals for the Ninth Circuit, and for docketing therein the appeal taken by defendants by notice of appeal filed July 12, 1955, is extended to October 10, 1955, pursuant to Rule 73(G) of the Federal Rules of Civil Procedure.

Dated: September 20, 1955.

/s/ LEON R. YANKWICH,
United States District Judge [290]

[Endorsed]: Filed Sept. 20, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 290, inclusive, contain the original

Amended and Supplemental Complaint;

Answer to Second Amended and Supplemental Complaint;

Order of Reference and Appointment of Special Master;

- Report of Special Master;
- Motion and Notice of Motion for Leave to Intervene;
- Affidavit of Fulton W. Hoge in Support of Motion to Intervene;
- Opposition to Motion for Leave to Intervene;
- Complaint in Intervention;
- Answer of Defendants in Intervention;
- Answer of Defendant, Treasure Company, a corporation, to Complaint in Intervention;
- Decision;
- Findings of Fact and Conclusions of Law;
- Judgment;
- Notice of Appeal; (by Plaintiffs in Intervention);
- Order Extending Time to Designate Record on Appeal;
- Notice of Appeal; (by defendants);
- Designation by Appellants Bullen, and Hayward of Record on Appeal;
- Statement of Points on Appeal by Appellants Bullen and Hayward;
- Designation by Appellees Walter Scoville and Adamant Co. of Additional Record on Appeal;
- Order Extending Time for Filing Record on Appeal;
- Motion to Extend Time on Appeal;
- Statement of Points on Appeal by G. de Bretteville and Treasure Co.;
- Designation by Appellants G. de Bretteville and Treasure Co.;

Designation by Appellees Scoville and Adamant Co. of Additional Record on Appeal;

Motion to Extend Time for Docketing Appeal;

Order Extending Time for Filing Record and Docketing Appeal; which together with three volumes of Reporter's Transcript of Proceedings in this Court; and the complete proceedings in the District Court of Appeals, Fourth Appellate District, State of California; Plaintiff's Exhibits 1 and 2 and Defendants' Exhibits B-1—B-6, inclusive, all in above cause, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing the foregoing record amount to \$4.00 (for combining the two records), which sum has been paid by appellants.

Witness my hand and the seal of said District Court, this 12th day of October, 1955.

[Seal]

JOHN A. CHILDRESS,

Clerk

/s/ By CHARLES E. JONES,

Deputy

In the United States District Court for the Southern District of California, Central Division

No. 1761-PH—Civil

WALTER SCOVILLE, et al., Plaintiffs,

vs.

G. de BRETTEVILLE, et al., Defendants.

HERSCHEL BULLEN, et al.,
 Plaintiffs in Intervention,

vs.

TREASURE COMPANY, et al.,
 Defendants in Intervention.

TRANSCRIPT OF PROCEEDINGS

Los Angeles, Calif., Tuesday, Jan. 18, 1955

Honorable Leon R. Yankwich, judge presiding.

Appearances: For the Plaintiffs: Leland J. Allen, 1200 Equitable Life Bldg., Los Angeles 13, Calif. For the Plaintiffs in Intervention: Hoge & Perry, by Fulton W. Hoge, 908 Security Title Insurance Bldg., Los Angeles 14, Calif. For the Defendants: John H. Rice and Max G. Kolliner, 900 Wilshire Blvd., Los Angeles 17, Calif. [2*] * * * * *

The Court: All right, gentlemen.

Mr. Hoge: Mr. Bullen, will you take the stand, please?

I will call Mr. Herschel Bullen, your Honor.

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

HERSCHEL BULLEN

called as a witness on behalf of the Plaintiffs in Intervention, having been first duly sworn, testified as follows:

The Clerk: State your name in full, please.

The Witness: Herschel Bullen.

The Clerk: Spell your first name.

The Witness: H-e-r-s-c-h-e-l.

The Clerk: And your last name?

The Witness: B-u-l-l-e-n.

The Clerk: And your address, please.

The Witness: Residence, 192 East First North, Logan. Business, 12 West Center, Logan.

The Clerk: What city?

The Witness: Logan City, State of Utah. [29]

Direct Examination

Q. (By Mr. Hoge): Mr. Bullen, you are one of the plaintiffs in intervention in this matter?

A. Yes, sir.

Q. Are you acquainted with Mr. Walter Scoville, Walter B. Scoville?

A. For over a period of many years, yes, sir.

Q. Did you have a business transaction with him back in 1938? A. Yes, sir.

Q. And was that transaction evidenced by any memorandum or written document?

A. Yes, sir.

Q. I will show you a photostatic copy of a letter, addressed to Mr. George Halverson, dated September 27, 1938, marked Petitioner's Exhibit 1, for

(Testimony of Herschel Bullen.)

identification, and ask you if that is the document to which you refer? A. Yes, sir.

Mr. Hoge: Your Honor, the original one that was introduced in the other case has apparently been misplaced. I would like to use this photostat here, if I may.

The Court: All right.

Mr. Allen: I don't understand, your Honor. The original was introduced in this other court case.

Mr. Hoge: I will bring that out.

Mr. Allen: It is a supposed copy.

Mr. Hoge: Your Honor, I will bring that out.

The Court: At any rate, are you satisfied with its authenticity?

Mr. Allen: That I don't know.

Mr. Hoge: Oh, excuse me. I should have shown it to you, counsel.

(The document was handed to counsel.)

Mr. Hoge: Will you mark this?

The Clerk: Plaintiff's B-1, for identification.

(The document referred to was marked Plaintiff's Exhibit B-1 for identification.)

Mr. Allen: I don't know. It is difficult. I think it is objectionable, your Honor. The original was used in the County court.

Mr. Hoge: I have not offered it yet. I want to do some more qualifying of it.

The Court: Of course, if an original is not available, a photostat copy, or even a copy, if the witness identifies it, may be used. Even if it is an ordinary copy, that would take the place of it.

(Testimony of Herschel Bullen.)

Q. (By Mr. Hoge): Mr. Bullen, would you state whether or not that is a copy of the document that you wrote to Mr. Halverson? [31]

A. Yes, sir. That bears my signature. That is the document, or a copy of the document.

Q. Do you recall at the time your deposition was taken, we introduced a document which was a carbon copy of the original letter?

A. Yes, sir.

Q. And that we were unable to find the original of that document? A. Yes, sir.

Mr. Hoge: I believe I served you with a copy of a notice to produce the original, counsel.

Mr. Allen: I have never had the original.

Mr. Hoge: Yes. However, I served you with a notice to produce it.

Mr. Allen: Yes, but where is deposition that has the copy? This is so involved that it is difficult to read it at all.

Mr. Hoge: Well, there is a copy which was typed as an exhibit to the complaint.

May I state briefly what happened, your Honor, for the information of the court? The original of this letter agreement was lost. Nobody was able to find it. Mr. Bullen had a written copy, which bore the signature of Mr. Scoville, and that was introduced in evidence before Judge Beaumont. This is a photostatic copy of that, and that document, which [32] was introduced before Judge Beaumont, is missing. It is not in the exhibits of the case. I don't know what happened to it. That went up to

(Testimony of Herschel Bullen.)

the Circuit Court of Appeals. It may have got lost up there. I don't know what happened to it.

Mr. Allen: That is the copy I had reference to, that was introduced, and you are unable to find that one?

Mr. Hoge: I am unable to find it, and this is a photostatic copy of the one that was introduced before Judge Beaumont.

The Court: In view of that statement, I will overrule the objection, and it may be received.

The Clerk: The exhibit will be marked as B-1 for the intervenor.

(The document heretofore marked Plaintiffs in Intervention Exhibit B-1 was received in evidence.)

Q. (By Mr. Hoge): Mr. Bullen, what happened to the original of this letter?

A. I don't know. It was mailed to George Halverson, the attorney, in Los Angeles.

Q. Did you have a carbon copy of it?

A. Yes, sir.

Q. And was that carbon copy signed by anyone?

A. It bore the signature of Walter B. Scoville, and The Walter B. Scoville Company.

Q. Is this a photostat of that carbon copy? [33]

A. Yes, sir.

Q. Down below the letter there is stated, "We agree to the foregoing," and then appear what purport to be certain signatures. One of them is "Walter B. Scoville." Will you state whether or not you know his signature?

(Testimony of Herschel Bullen.)

A. Yes, sir, that is Walter B. Scoville's signature.

Q. And that was on this copy?

A. And "The Walter B. Scoville Company, by Walter B. Scoville," yes, sir.

Q. Now, was any statement made to you by Mr. Scoville in regard to whether or not he had any authority to commit the operator of that well, or the lessee of that well, to a payment of \$10,000 out of 15 per cent of gross production?

Mr. Rice: Your Honor, I object to that as hearsay, your Honor, insofar as Treasure Company is concerned.

The Court: You cannot prove agency by the declaration of an agent.

Mr. Hoge: I am not trying to prove agency. I am trying to prove his representations.

The Court: That does not make any difference. If the representations relate to agency, to the power to act for a group, it does not make any difference whether he makes a representation or not. This is not a suit to re-form an instrument, and it isn't a suit to set it aside on the ground of misrepresentation. You are relying on the instrument. [34]

Therefore, authority to enter into the agreement on behalf of a corporation or whatever the group was must be shown, and by declarations other than that of the agent.

A representation of an agent that he is an agent still requires proof of the agency, whether you call it a representation or not.

(Testimony of Herschel Bullen.)

Mr. Hoge: I don't offer that for the purpose of proving the liability of the Treasure Company on the agreement, but only to show the equities of the situation, that these people put their money in there for a definite——

The Court: Oh, no, equity is not nebulous. Equity has existed for 300 years, and, therefore, those principles have been established, and any representation as to agency would not go. Either he had the right to bind them, or he did not, and unless an equitable estoppel should arise, then you still have to show it by acts. There is such a thing as ostensible agency, under the law of California, but ostensible agency consists of acts done to induce others to believe that a person is an agent.

When I was on the Court of Appeals pro tem, on the State Court of Appeals, I wrote an opinion in *Brea vs. McGlashan*, 3 C.A. (2) 454, in which I held that by referring an inquiry to a particular person and having certain signs in the office indicating that the person had certain authority may induce action which may establish agency, but you cannot prove agency [35] by a representation of the parties.

Mr. Hoge: No. My theory is in the nature of an estoppel by a deed, then. Here is a situation when Mr. Scoville purported to bind this production from this well by the payment of certain money.

Now, the evidence apparently is that he had no authority to do so. In fact, that was one of the

(Testimony of Herschel Bullen.)

findings of Judge Westover. But my position is that he, having represented that he had authority, having purported to——

The Court: Oh, no, you cannot get behind the fact of an agent. Estoppel involves several things. It involves, first an act not on the part of the agent, but on the part of persons inducing others. And when you are dealing with the question of the authority of agency, you have to show that the corporation knew of this, and that they induced the person to rely on it, and that he relied on it to his detriment. Those are the elements of estoppel. You cannot change a lack of power to bind by calling it estoppel, and proving it by the acts of the agent.

Mr. Hoge: No, but I am speaking of the stoppel of the agent himself, your Honor, based on his representations that he had something which he didn't have. In other words, take the familiar case of estoppel by deed. If "A" owns only an undivided interest in blank acre, and he gives a deed purporting to convey the fee, then any interest that he has [36] will pass. He is estopped to claim that the instrument did not pass whatever he owned.

The Court: Oh, that is true. A man cannot take advantage of his own wrong. But that would not be binding on anyone but Scoville himself.

Mr. Hogue: That is all I offer it for, your Honor.

The Court: And as far as Scoville himself is concerned, that is all right.

Mr. Rice: Your Honor, I would like a stipula-

(Testimony of Herschel Bullen.)

tion from Mr. Hoge that we may have a continuing objection.

The Court: I beg pardon?

Mr. Rice: I would like a stipulation, your Honor, if I may, so that I won't have to make continuing objections.

The Court: I don't like those continuing objections. You can make your objections at the proper time. I already said that I am allowing it only as to Scoville, because the question may arise whether, so far as he is concerned, he is bound by a representation he made, but that would not apply to The Adamant Company, or anyone else but himself.

Mr. Hoge: So far as I am concerned, that objection may be deemed made to any similar question.

Q. Then will you answer the question, Mr. Bullen, as to what was said about Mr. Scoville's position in the enterprise, and what his authority was, if anything? [37]

A. He said that he was the—practically the boss of it, that he was the representative of the major interests in the well; that he, The Adamant Company, Mr. Seepie, and some other minor interests were in control; that he had put in \$10,000, which had gone into the well under his control, but he hadn't arrived at the desired objective, that is, he hadn't brought the well in, and it required more money, in brief, \$12,500 of actual cash, together with credit to buy tools, machinery, and so forth, for which he had arranged, and if he could get

(Testimony of Herschel Bullen.)

\$12,500, the well at that time was at approximately 5,000 feet, down to what you would term a basement schist, and he submitted a log which he called a Schlumberger, or Schlumberger check, or something of that sort,—apparently an electric core.

The Court: They call it the Schlumberger test. He is a Frenchman who has a German name, and they pronounce it Schlumberger.

The Witness: That was something new to us Mormons in Utah.

The Court: It is a device in geophysics, whereby, I think, they explode dynamite in the ground and they follow a trail, and can tell something by it. I don't know exactly what it is.

Mr. Hoge: I have heard the name, Schlumberger, and I have seen the spelling, but I couldn't connect it together.

The Court: It is S-c-h-l-u-m-b-e-r-g-e-r. He is a Frenchman who has a German name, like many Frenchmen. [38]

The Witness: This credit that he had in the \$12,500 in his opinion would bring the well into production.

Q. (By Mr. Hoge): Now, excuse me for interrupting, but, Mr. Bullen, did he make you an offer, or did you bargain for what you were to get?

A. No, he made us an offer. I was going to get up to that.

He said that in order to continue his contract, or in order to fix it so we could make a whole lot of money, and that is what we wanted to make, that

(Testimony of Herschel Bullen.)

it looked apparently that it was a well that would produce 20,000 barrels a day, but he had to bring in, as I recall it, a well that would produce 200 barrels, and if he had that—200 barrels a day, and if he did that, then he would be interested, or would be in control or such control as he was in at the time, on 17 acres of contiguous territory, so that it looked good to us.

Then, in answer to its operations, he gave me to understand that it would be operated under him by a committee of Joe Seepie, Harry Wynn and G. de Bretteville, a committee that apparently had been approved for operations until it had accomplished the purposes prescribed by all of the interests.

Q. Now, did he say anything at that time, or did you know anything at that time about any difficulties that he might have been having with Mr. de Bretteville? [39]

A. He said that there was some difficulties with some of the other interests, but those interests were such that they would be overcome, and he would let me know when and if they were overcome. And he later gave me a letter to that effect.

Mr. Hoge: May I have the exhibits here, please?

(The documents were handed to counsel.)

Mr. Hogue: That is one exhibit that is still available.

Q. I will show you a letter dated October 20, 1938, signed "Walter B. Scoville," addressed to

(Testimony of Herschel Bullen.)

“My dear friends,” and ask you if that is the letter to which you refer?

A. That is the letter, and we were dear friends.

Mr. Hogue: I will offer this as Exhibit——

The Clerk: B-2.

Mr. Hoge: ——B-2 for the petitioners in intervention.

The Court: It may be received.

(The document referred to was marked Plaintiffs in Intervention Exhibit B-2, and was received in evidence.)

Q. (By Mr. Hoge): Now, that was after you had sent down the money to Los Angeles; is that right? A. Pardon?

Q. That was after you had sent the money down to Los Angeles—— A. Yes, sir. [40]

Q. ——in accordance with this letter to Mr. Halverson? A. Yes, sir.

Q. I will show you photostatic copies of two cashier's checks and ask you if they were the——

Mr. Hoge: Do you want to see them, Mr. Allen?
(The documents were handed to counsel.)

Q. (By Mr. Hoge): I will ask you if these are the photostatic copies of the checks which were sent down with your letter, that is Petitioner's Exhibit A-1?

The Clerk: What do you mean by Exhibit “A”?

Mr. Hoge: What is our first exhibit?

The Clerk: B-1.

Mr. Hoge: Oh, ours are “B” then. Thank you.

Q. B-1?

(Testimony of Herschel Bullen.)

A. Yes, those are copies of the checks or drafts.

Q. And were those checks returned to the banks on which they were drawn,—the originals of those?

A. Yes, sir. We later borrowed them, and sent them down.

Q. And they were introduced in evidence in the other case, the condemnation case?

A. That's right.

Q. Are you familiar with Mr. de Bretteville's signature?

A. Yes. That looks to be an exact copy of the signatures that he later placed on letters that we received.

Mr. Hoge: I offer these checks in evidence, that is, the [41] photostatic copies.

The Clerk: Admitted, your Honor?

The Court: They may be received.

The Clerk: Exhibit B-3.

(The documents referred to were marked Plaintiffs in Intervention Exhibit B-3, and were received in evidence.)

Q. (By Mr. Hoge): At the time that letter, Exhibit B-1, was sent down with the checks, was any other document sent down with it?

A. There was a legal document for consent to transfer, I think it was called.

Q. An application to the Commissioner of Corporations?

A. An application to the Commissioner of Corporations.

Mr. Hoge: Do you want to see this?

(Testimony of Herschel Bullen.)

(A document was handed to counsel.)

Q. (By Mr. Hoge): I will show you a document here, which is a photostatic copy of an application to the Commissioner of Corporations for consent to transfer in escrow, and ask you if that is the document that went down with this letter to Mr. Halverson?

A. Yes, sir, that is the document.

Mr. Hoge: Your Honor, this is a group of documents which contains a certification by the Commissioner of Corporations, which is in effect a chain of title of Mr. Scoville's [41] interest. It has the assignments from him.

The Court: I think it may be received in evidence as one exhibit. In argument you may refer to the particular ones.

The Clerk: B-4.

Mr. Allen: I would like to make this point at this time, your Honor, that we don't want to be bound.

The Court: I can't hear you.

Mr. Allen: The first exhibit, which calls for an assignment of 18-1/3 per cent, evidently that had been voided, because the next one in the list with 19 is correct, and the first one was never carried out.

The Court: All right. I will hear the arguments on it.

Mr. Allen: All right. Otherwise we have no objection to the exhibit.

The Court: All right.

(Testimony of Herschel Bullen.)

(The documents referred to were marked Plaintiffs in Intervention Exhibit B-4, and were received in evidence.)

Q. (By Mr. Hoge): Now, at the time you talked to Mr. Scoville, I understood you to say he was making this same offer to various other people?

A. Yes, sir.

Q. And that offer was what?

A. It was up to \$12,500 was to be paid back two for one [42] out of the first 15 per cent of production, and to each individual who was contributing \$2500, they were to receive one per cent participating royalty interests.

Q. Now, in regard to that agreement to repay at two for one out of production, did you make any inquiry, or did it occur to you as to whether or not that might be a usurious transaction?

A. Yes. It rather looked to us up in Utah as somewhat extravagant. We couldn't hardly feature how people could make so much money. We talked that over with our attorneys up there, Young & Bullen, Mr. Young in particular, who thought he could only apply—that he could not advise as to Utah law, and suggested that we consider it with some legal authorities in Los Angeles.

I asked Walter—when I say Walter, I mean Walter B. Scoville—I asked him who drew up the papers, the consent to transfer, and, as I recall it, he said Charles Franklin Johnson, with offices in the Subway Terminal Building.

(Testimony of Herschel Bullen.)

I happened to be down in Los Angeles a few weeks later on some other matters, and he introduced me to Attorney Johnson. I talked it over with him, and I had either prior to that time—if not prior, I did later write him a letter on the matter, along with some other things, to which he replied, and his advice in the matter was to the effect that under the circumstances and conditions it was not usurious. [43]

Mr. Hoge: Your Honor, I offer this letter from Mr. Johnson, not for the purpose of argument as to the accuracy of the opinion, or for the purpose of proving anything stated in it, but only to show that there was no intention on the part of these people to violate any usury law, and I think the opinion is correct, that it does not.

The Court: All right.

Mr. Allen: I object to the letter so far as Mr. Scoville is concerned on the ground that it is hearsay.

Mr. Hoge: I am not offering it for what it contains, but to show the bona fides of the investors.

The Court: Do I understand you to say that Mr. —who referred you to him, or who told you that Mr. Johnson had been retained?

The Witness: Walter Scoville.

The Court: Of course, when there is a reference to another person, then it is permissible. Overruled. It may be received.

The Clerk: B-5.

(Testimony of Herschel Bullen.)

(The document referred to was marked Plaintiffs in Intervention Exhibit B-5, and was received in evidence.)

Q. (By Mr. Hoge): When did you first meet Mr. de Bretteville, Mr. Bullen?

A. I didn't meet Mr. de Bretteville until after the well [44] had been taken over by Mr. de Bretteville, or his interests, or someone prior to the Scoville interests. I don't know, and I don't recall, but it was some time after that.

Q. Can you recall who was present at that conversation? A. The what?

Q. Who was present at the time you met Mr. de Bretteville?

A. I met him at—Dr. Hayward and I met him at the same time.

Q. Did you have any conversation with him in regard to your investment at that time?

A. With regard to what?

Q. With regard to the investment you had made in this well.

A. Oh, yes. But, come to think about it now, we made a special trip. Dr. Hayward, with Ernest T. Young of the firm of Young & Bullen, came down, and we telephoned to Mr. de Bretteville and made an appointment with him. That was after he had taken it over, and we called on him in relation to our interests.

Q. And can you state what was said about your interests at that time?

(Testimony of Herschel Bullen.)

Mr. Allen: I object to that as hearsay as far as Walter Scoville is concerned.

The Court: Overruled. It is limited to the persons involved. [45]

The Witness: What was the question?

Q. (By Mr. Hoge): What was the conversation with Mr. de Bretteville at that time with regard to your interests?

A. We told him first how we understood it, that we had invested \$2500 each, to be paid two for one for one out of production, and we didn't get any satisfactory information out of de Bretteville, that we were to get anything.

Q. Well, did he say whether or not he had known about this two for one arrangement? What did he say about that?

A. I don't recall whether he said that he knew anything about it prior to that time or not.

Q. At any rate, you never got any payment from Treasure Company on account of your investment? A. No; no.

Q. Either your repayment of your money, or the royalty interest that you acquired?

A. None whatever.

Q. Did you ever get any payment from Mr. Scoville on account of it?

A. None whatever.

The Court: All right.

Mr. Hoge: Just pardon me a minute, your Honor.

The Court: I beg pardon?

(Testimony of Herschel Bullen.)

Mr. Hoge: I want to refer to my notes, if I may, just a second. [46]

The Court: All right.

Mr. Hoge: I believe that is all of this witness. You may cross-examine.

The Court: All right. Gentlemen, I did not want to interrupt you. You know I do not look at the clock, but this is a good time to quit. As you know, I have many additional duties as Chief Judge, so we will take our noon recess, so as not to break the continuity of the cross-examination.

Mr. Hoge: I am sorry, your Honor. I didn't realize it was so late.

The Court: That does not matter. Never look at the clock. Let me do that.

Mr. Hoge: All right.

The Court: Whenever I am ready to quit, I will let you know. Don't worry about it.

Mr. Rice: Your Honor, may I state that Mr. Moore, who is an accountant and a prospective witness for the defense, had a death in his family, and I don't know whether I will be able to get to him this afternoon or not. I think I can get to him tomorrow morning.

The Court: I don't know whether we will finish this today or not.

Mr. Rice: I didn't know whether——

The Court: Of course, we can always take a witness out of [47] order. I merely wanted the case started. Now, after this gentleman is finished, if you want to put on a witness out of order, who

has illness in the family, or for other reasons, I have no objection.

Mr. Hoge: Did I understand your Honor correctly this morning, that you wanted the case of the plaintiffs in intervention, as well as the defendants' case completed before we go on with the accounting action?

The Court: What do you mean, the accounting action? In a case like this, what is there to the accounting action?

Mr. Hoge: Well, we have a dual interest here, your Honor. We are intervening to seek relief against Scoville on the two for one agreement.

The Court: The question of the accounting is merely a question of figures. If there is an additional accounting to be made from that decree, then after the case is closed, we can keep it open until we receive additional testimony. In other words, in a case like this, you cannot try it piecemeal. I would present your prima facie evidence to show you are entitled to this relief, or the other relief, and not wait until they do proceed.

Mr. Hoge: I just wondered if our case on the two for one agreement was to be completely tried before the rest of it, or how.

The Court: In a case like this, they are all mixed up. [48] So I say put on whatever testimony you desire to produce to show you are entitled to an accounting. I don't think anybody disputes the question that you are entitled, in the abstract, to an accounting. Anyone who has an interest has a right to ask for an accounting, whether they are

directors of the corporation, or what their status is. The question they dispute is whether you are entitled to any money under the accounting.

Mr. Hoge: Our particular interests, or the plaintiffs in intervention are alined with the plaintiffs on that issue. You see, the plaintiffs in intervention have other interests in addition to the two for one.

The Court: All right. Then let them present their testimony on that issue, and then you may add to it.

Mr. Hoge: But I simply wanted to dispose of my claim on the two for one issue.

The Court: You cannot divide it. When issues like this are intertwined, you cannot split them. I try not to overlap, but, of necessity, it doesn't make any difference. Ultimately the case is not closed until all the evidence is in, no matter in what order you present it. But I suggest you present it in that manner. Many a time when there are counter-claims, and so forth, I say to the person who has the affirmative, "Don't offer your testimony in rebuttal to the counter-claim, but wait until they have offered it." [49] Except as to that, you may present everything you have.

Mr. Hoge: Yes, sir.

The Court: All right. 2:00 o'clock.

(Whereupon at 12:25 o'clock p.m., a recess was taken until 2:00 o'clock p.m. of the same date.) [50]

The Court: All right, gentlemen, proceed.

Mr. Hoge: Mr. Bullen, will you resume the stand, please.

The Court: All right.

HERSCHEL BULLEN

resumed the stand as a witness on behalf of the plaintiffs in intervention, having been previously duly sworn, testified further as follows:

Direct Examination—(Continued)

Q. (By Mr. Hoge): Mr. Bullen, during the conversations which you had with Mr. Scoville prior to sending your money down and making this investment, did Mr. Scoville tell you what his interest in the venture was?

A. Yes, he told us his interest was approximately, as I recall it, 19 per cent; The Adamant Company, of which his daughter was an officer, 25 per cent; Joe Seeples, 6 per cent; and Harry Wynn, approximately somewhere around 6 per cent.

Q. Did he say anything else in regard to those holdings of himself and his family?

A. Anything else? I don't understand what you mean.

Q. I mean, did he make any comment at all as to the [51] position of those holdings, or how they would affect your interests at all?

A. Oh, yes. Those holdings, they are approximately the majority holdings.

Q. Just what he said now, Mr. Bullen, if anything, about that.

A. He said, "We are the majority holders. You

(Testimony of Herschel Bullen.)

are safe, you are absolutely safe. If the well comes in, you will get your royalties, plus your two for one. If it is a failure, you will get your 80 acres over in Baxter Basin, and if there is any question, my own personal interest is sufficient to take care of you and myself."

Q. Did he at any time say anything about that 19 per cent of his being owned by anybody else?

A. No, never.

Q. Did he ever mention any claim of Mr. Seepie to that interest?

A. Not in connection with that interest. If he had, we would never have taken it, or never have given him our money.

Mr. Allen: I ask that last statement be stricken.

The Court: That last may be stricken.

Q. (By Mr. Hoge): When did you first hear of any possible claim that Mr. Seepie might have to that 19 per cent?

A. Not until we came to Los Angeles on this suit. [52]

Mr. Hoge: Your witness.

The Court: All right.

Cross Examination

Q. (By Mr. Allen): You related a statement made,—that you talked to Mr. Johnson, the attorney. A. Yes.

Q. At that time did Mr. Johnson tell you that he was not attorney for Mr. Scoville, nor for Mr. de Bretteville? A. Yes.

(Testimony of Herschel Bullen.)

The Court: What was the answer?

The Witness: Pardon?

The Court: Did you answer?

The Witness: Yes, I answered.

The Court: What did you say?

The Witness: I said, "Yes."

The Court: All right.

Q. (By Mr. Allen): Now, in reference to your conversation with Mr. Scoville, did he not tell you that your two for one would come out of the first 15 per cent production from Treasure Well?

A. Yes, sir.

Mr. Rice: Your Honor, I will object to this on behalf of the Treasure Company as hearsay. [53]

The Court: I will admit it as to the particular defendant, and I will see later on if it is tied to the others or not. Go ahead.

Q. (By Mr. Allen): And the two for one was not chargeable against any particular interest, was it?

A. I think that's right.

Q. That's right. In other words, it was not chargeable to Mr. Scoville's personal interest, nor to Mr. Bodkin's nor to yours, nor to Mr. Hayward's; isn't that right?

A. That's right.

Q. But it was to come out of the total production?

A. That's right.

Q. And you understood that fully, didn't you?

A. Certainly, and Mr. Scoville was to get it for us.

Mr. Allen: I ask that last be stricken, your Honor, as a conclusion of the witness.

(Testimony of Herschel Bullen.)

The Court: That may be stricken.

Q. (By Mr. Allen): Now, you placed your money, —you sent it down on September 27, 1938, to Mr. Halverson, didn't you?

A. I think that's the date.

Q. And in that letter you requested that he send his bill for services to you, and you would remit for them——

A. I did.

Q. ——did you not? [54]

A. Yes, sir, that was providing he made the contract.

Q. Well, did he remit a bill to you?

A. No, it speaks for itself. I asked him to draw the contract and send the bill to us, and we would pay it.

Q. You would pay it. You employed him as your attorney, didn't you?

A. Well, to that extent, yes.

Q. Now, you have an action pending in the Superior Court involving this same issue, haven't you, against Treasure Company?

A. I think that's still there.

Q. Still there? A. Yes.

Q. That is on the two for one, and also on your income from the two per cent, is it not?

A. I think that's right.

Q. And that action is against Treasure Company, The Adamant Company, and Walter B. Scoville, isn't it?

A. As I understand it.

Q. That is right, isn't it?

A. I think so.

(Testimony of Herschel Bullen.)

Q. Yes. And that action, as far as you know, hasn't been brought to trial yet?

A. That's right. It hasn't been brought to trial, as far as I know. [55]

Q. That action was filed some time in 1939 or '40?

A. Yes.

Q. Now, isn't it a fact, Mr. Bullen, that you and Dr. Hayward have received about \$3500 from this two for one, or on the royalty per cents?

A. No.

Q. How much did you receive?

A. Nothing.

Q. Didn't you receive \$3500 from Mr. Bodkin's office?

A. We received some money on our contract that we sold,—a cash payment, and the balance to be paid in installments, for our interest.

Q. For your two per cent interest?

A. Whatever it was, our interest in the well.

Q. That is yours and Dr. Hayward's?

A. Yes.

Q. And that amount was \$3500, wasn't it?

A. No.

Mr. Hoge: I have a letter from Mr. Bullen, which Mr. Bullen wrote, which may refresh his recollection, if you want to get the exact figure.

(The document was handed to counsel.)

Q. (By Mr. Allen): Just to refresh your recollection, Mr. Bullen, will you glance at that letter and see if you can now state? [56]

A. Yes, that's right.

Q. What is the figure, then, that you received?

(Testimony of Herschel Bullen.)

A. \$3633 principal balance. No, that is principal and interest,—no.

Q. What is that figure? A. \$3633 total.

Q. \$3634? A. That is \$1817 each.

Q. Each,—you and Dr. Hayward?

A. Yes.

Q. And you received that money, didn't you?

A. Received that money on that contract, yes.

Q. Now, after you talked with Mr. Scoville, as you have related, you came down to Los Angeles, did you not, and made an investigation?

A. Yes.

Q. And you knew the conditions that the well was being held under, did you not? You investigated that?

A. Well, not in particular. We knew from what Mr. Scoville told us, as I stated, that it was operated or supervised by Joe Seeples, and Harry Wynn, and Mr. de Bretteville.

Q. And in that consent to transfer—

Mr. Allen: May I have Exhibit B-4?

(The document was handed to counsel.) [57]

Q. I show you Exhibit B-4, and ask you to look at Page 4 of Exhibit B-4, the application for consent to transfer, and look at the bottom of the page, and I ask you whose signature this is?

A. That is Herschel Bullen's.

Q. Is that your signature? A. Yes.

Q. And under it, "Mary H. Bullen"?

A. Yes, sir.

Q. Is that in her handwriting?

(Testimony of Herschel Bullen.)

A. Yes, that is her handwriting.

Q. And is that J. C. Hayward's handwriting?

A. That's right.

Q. And is this Marian S. Hayward's handwriting?

A. That's right.

Q. And that says, "The undersigned individuals, named in the foregoing Application as prospective transferees of the participating royalty interests therein described, do hereby certify that they have individually known Walter B. Scoville for a long period of time; that they are familiar with the condition of and facts relating to the above mentioned well; that they are familiar with the general plan of operation and that they desire to have transferred to them within escrow participating royalty interests in the amounts set opposite their names hereinabove." [58]

A. That's right.

Q. You have investigated, and so you signed that; is that true?

A. Yes.

Q. And at that time did you know that there was a so-called executive committee appointed under the contract of April 5, 1938, of de Bretteville and Seeples?

A. All we knew was what Mr. Scoville told us. I don't know whether you mean by the executive committee, Seeples and Wynn and de Bretteville. If that is what you mean, we knew it, yes.

Q. You knew that. And when you wrote Mr. Charles Johnson seeking the information, which you introduced a letter pertaining to, did you show any of that letter to Mr. Scoville, any part of it?

(Testimony of Herschel Bullen.)

A. I don't recall whether I did or not. I would have. He and I were close friends.

Q. You would have if you had happened to see him; is that it? A. Yes, that's right.

Q. In fact, when Walter Scoville first talked to you, one of your first conversations was up in—was at Ogden, or Logan City?

A. I think we talked first at Salt Lake. I think I met him one day at Salt Lake first at the Hotel Utah, and [59] he told me about it, and later came up.

Q. Didn't you tell him at that time that you were going down to California, and you would look the thing over?

A. No, I didn't at that time, but after he came to Logan, and he then asked me and Dr. Hayward to come, I told him I was coming down.

Q. And you would look it over?

A. Yes.

Mr. Allen: I think that is all.

The Court: All right. Do you desire to ask any questions?

Cross Examination

Q. (By Mr. Rice): Mr. Bullen, I believe you testified this morning that in your original conversations with Mr. Scoville, he told you that he needed \$12,500 and also the establishment of some additional credit. Did I understand you to say that he told you that he had arranged for that additional credit?

A. Well, I don't recall just the words he used,

(Testimony of Herschel Bullen.)

but he said that that was forthcoming, tantamount to that anyway, because I know where he got it.

Q. Well, where did he get it?

A. He got it, as I understood it, from the Halverson boys.

Q. And that he represented to you was for the purpose of [60] completing the well?

A. Yes, certainly. That was all his representations were, for completion.

Q. Now, you spoke a moment ago of what Mr. Scoville had represented to you as the interest in the well, and you made some reference to 80 acres in some Basin, which you said he told you you would have in the event that the Treasure Well came in dry or was a failure? A. That's right.

Q. Would you explain what that reference was to the 80 acres?

A. Well, that is included in our letter to Mr. Halverson, where Walter Scoville, in the event the well was a failure he would give us, I think it reads, comparable interest in 80 acres in Baxter Basin, State of Wyoming.

Q. And that was acreage which he presumably owned himself, or controlled?

A. Either that, or the Scoville Company, which he controlled, certainly.

Q. I see. Mr. Bullen, did you then, in making this deal with Mr. Scoville, ever look to the Treasure Company personally for the repayment of this debt, or was it between you and Mr. Scoville individually? A. We looked——

(Testimony of Herschel Bullen.)

Mr. Allen: I will object to that as calling for a conclusion [61] of the witness, your Honor.

The Court: That is all right. Overruled. Go ahead.

Q. (By Mr. Rice): You may answer, Mr. Bullen.

A. We looked to the return of oil from the well on our two for one, which was to come out of 15 per cent of the first production from the well.

Q. Well, you have just testified that Mr. Scoville was guaranteeing to you that if the well produced nothing, he would give you a comparable interest in some other property. Did you understand that other property to belong to Treasure Company, or was that Mr. Scoville's personal property?

A. That was Scoville's personal property.

Q. So you were making a deal with him individually; is that right? A. That is——

Mr. Allen: I will object to that.

The Court: I will sustain the objection. That is an inference to be drawn by the court.

Mr. Rice: That is all, your Honor.

The Court: All right.

Mr. Hoge: I have one or two questions on redirect, your Honor.

The Court: Go ahead. [62]

Redirect Examination

Q. (By Mr. Hoge): Mr. Bullen, you testified that you received, I think, some \$3700 from some source in relation to this matter? A. Yes.

(Testimony of Herschel Bullen.)

Q. Will you explain that transaction to the court, just what it was?

A. It was for and in consideration of the sum of \$7000. We were selling our right, title and interest,—all the right, title and interest we had to our agreement for one per cent royalty and two for one out of the 15 per cent.

Q. In other words, all the interest that you had was being sold? A. That's right.

Q. And you got some money under a contract of sale, did you? A. Yes, sir.

Q. Then was there a default in that contract?

A. There was a default, and it was returned to us.

Q. So all your rights were returned to you?

A. All our rights were returned.

Q. I will show you a contract, dated the 30th of June, 1942, between Herschel Bullen and Mary H. Bullen, and J. C. Hayward and Marian S. Hayward, his wife, and Fred Witman. [63]

A. That's right.

Mr. Hoge: Do you want to see this?

Mr. Allen: Oh, yes. I will go over it as fast as I can. I think I have seen enough, Mr. Hoge.

Q. (By Mr. Hoge): I will show you this document, Mr. Bullen, and ask you if that is the sales contract to which you referred?

Mr. Hoge: Do you want to see this, Mr. Rice?

Mr. Rice: No, I know about that.

The Witness: That is the contract.

Mr. Hoge: We will offer this document as ex-

(Testimony of Herschel Bullen.)

hibit next in order of the plaintiffs in intervention.

The Court: It may be received.

The Clerk: B-6.

(The document referred to was marked Plaintiffs in Intervention Exhibit B-6, and was received in evidence.)

Q. (By Mr. Hoge): It was under this contract that the payments you have testified to were received, as payments on the purchase price of your rights, which were sold under this contract; is that right? A. That's right.

Q. And after that the purchaser defaulted?

A. Pardon?

Q. The purchaser defaulted in the payments?

A. That's right.

Q. And you notified him that all his interests were terminated? A. Yes, sir.

Q. And no other claim has been made by him to any of your rights?

A. No claim whatsoever.

Q. One more question. Do you know Mr. Seeples?

A. Yes, sir.

Q. J. Orville Seeples? A. Yes.

Q. Did you see him after you had put your money in, or before?

A. I saw him after. I don't think I saw him before.

Q. Have you had conversations with him about this well? A. Oh, yes.

Q. At any time did he make any claim to the 19 per cent interest of Mr. Scoville?

(Testimony of Herschel Bullen.)

A. Never.

Mr. Hoge: That is all.

Recross Examination

Q. (By Mr. Allen): Mr. Bullen, when this contract, Exhibit B-6, was [65] entered into, with whom did you negotiate?

A. Mr. Hoge negotiated it through Attorney Bodkin.

Q. Through Attorney Bodkin? A. Yes.

Q. And Attorney Bodkin at that time represented Treasure Company and G. de Bretteville, didn't he?

A. I assume that he did. Prior to that he did. I don't know whether he did then or not.

Q. This is dated June 30, 1942. Turning to Page 3 of this exhibit,—

Mr. Hoge: Mr. Allen, I will stipulate that Mr. Bodkin was representing, as far as I know, was representing Treasure Company and Mr. de Bretteville at that time.

Mr. Allen: I will accept that stipulation.

Q. I notice on Page 3, at the top of the page we find some initials there. That "G.deB.," is that Gustav de Bretteville?

A. Let's see. Yes, that is de Bretteville.

Q. And I suppose "J.C.H." is J. C. Hayward?

A. That is mine (indicating), and that is Dr. Hayward's.

Q. Under "G.deB." are your initials, and then comes "J.C.H."?

(Testimony of Herschel Bullen.)

A. And that (indicating) is my wife's.

Q. And your wife's, and Mrs. Hayward's,
"M.S.H."?

A. Yes, that is Mrs. Hayward's. [66]

Q. Then I notice on Page 4 we find the initials
"G.deB." Is that Mr. de Bretteville's initials?

A. It looks like it.

Q. The same on Page 5?

A. Yes, looks like it.

Q. Then on Page 6 we see several initials?

A. Yes. I take it they are the same.

Q. They are the same? A. Yes.

Q. G. de Bretteville, and yours, and "J.C.H.,"
Mr. Haywards, "M.H.B.," and "M.S.H." and
"F.W."? A. Right.

Q. And I guess Page 7 also bears G. de Bretteville's initials on it, does it not? A. Yes.

Q. Then on Page 8 we find the same group of three initials,— A. Right.

Q. Including G. de Bretteville? A. Right.

Q. And the same six initials on Page 10?

A. Right.

Q. Including G. de Bretteville's? A. Yes.

Mr. Hoge: You might notice, Mr. Allen, that the [67] obligations of the buyer under that contract was guaranteed by Mr. de Bretteville.

Mr. Allen: Yes.

Mr. Hoge: So he initialled any changes because he signed the guarantee attached to it.

Q. (By Mr. Allen): You never met this man, Fred Witman, did you? A. No, sir.

(Testimony of Herschel Bullen.)

Q. You don't know who he is? A. No.

Mr. Allen: That is all.

The Court: All right. Step down, Mr. Bullen.

(Witness excused.)

The Court: Call your next witness.

Mr. Hoge: I will call Dr. J. C. Hayward.

J. C. HAYWARD

called as a witness on behalf of the Plaintiffs in Intervention, having been first duly sworn, testified as follows:

The Clerk: State your name in full, please.

The Witness: J. C. Hayward.

The Clerk: Spell your last name.

The Witness: H-a-y-w-a-r-d.

The Clerk: And your address?

The Witness: 315 Boulevard is my residence, and my [68] business is 547 North Main, Logan, Utah.

Direct Examination

Q. (By Mr. Hoge): Dr. Hayward, you are one of the plaintiffs in intervention in this matter?

A. Yes, sir.

Q. And you, with Mr. Bullen, made the investment to which Mr. Bullen has testified?

A. Yes, sir.

Q. Your check for \$2500 was sent down with that letter to Mr. Halverson? A. Yes, sir.

Q. Were you present at any of the conversations before this letter was sent down, in any of the discussions with Mr. Scoville?

(Testimony of J. C. Hayward.)

A. Yes, sir, a number of times.

Q. Can you tell the court, briefly, what Mr. Scoville represented to you about the matter at **that** time?

Mr. Rice: Your Honor, I would like to object again on the grounds that this is hearsay as to Treasure Company, and that this is incompetent and irrelevant to the issues of this case, inasmuch as the law of this case, which was decided by the Ninth Circuit Court of Appeals has held that the interests of Bullen and Hayward were a personal [69] undertaking of Scoville, and not of Treasure Company.

The Court: I will overrule the objection. I will admit it only as to those defendants, personal defendants, with whom the conversation was had. **Go** ahead.

The Witness: Would you mind reading the question, please?

(The question was read.)

The Witness: He said that he had invested some money in an oil well in the Venice or Del Rey, or some area in California, and that it had been drilled to a depth through which they had passed what they considered to be a very highly concentrated oil-gas zone, and that it had all the evidence of being a very high producing well if it were brought in, and that they had run out of funds, and he was authorized by a committee that was operating the well to raise funds, and, likewise, to raise materials

(Testimony of J. C. Hayward.)

on credit to bring this well in, and he was looking around for prospective investors.

Q. (By Mr. Hoge): Did he say what terms he was offering to the investors?

A. On our first visit I don't think he did, but subsequently he did, and the terms were that he would—he was in a position to offer a two for one repayment of any monies advanced, along with a one per cent participating royalty interest in the well. [70]

Q. Now, did you at any time after this investment was made, discuss the matter with Mr. de Bretteville? Did you make some trips down to Los Angeles after that?

A. Yes, not—I didn't come down until after the well was on production.

Q. Did you have any discussion, then, with Mr. de Bretteville about the matter?

A. Yes. On our first visit here, Mr. Bullen, and our attorney, Mr. Young, came down and met in Mr. Bodkin's office with Mr. Gass, Mr. Bodkin, and Mr. de Bretteville, and discussed the matter of the well, its production, and the payment of some of our monies, which we knew was due us and should have been paid before.

Q. Well, did you make any demand at that time, or any request for payment on the two for one agreement, so-called, that is, the repayment of your investment?

A. Yes, we asked why we hadn't been receiving it, and when we were going to start receiving it.

(Testimony of J. C. Hayward.)

Q. And do you recall what was said about that?

A. Oh, among other things,—

Mr. Allen: Your Honor please, I object to this as hearsay so far as Mr. Scoville is concerned. He was not present.

The Court: It is limited to the particular persons.

Mr. Allen: To the particular persons, very well.

The Witness: Mr. de Bretteville said he had no knowledge of any such a contract as far as raising funds was concerned, and he had no part in it, and it was up to us to look at Mr. Scoville, who had made the contract with us, for our money.

Q. (By Mr. Hoge): Was he speaking about the two per cent royalty at that time or the two for one? A. No, the two for one.

Q. He made no objection to the two per cent royalty?

A. As far as I know, he has never objected to the one per cent each of participating royalty.

Q. Do you know Mr. Seeples? A. Yes, sir.

Q. J. Orville Seeples? A. Yes, sir.

Q. Have you had any discussion of this matter with him after you made your investment?

A. As far as the two for one is concerned?

Q. Or in regard to any part of the matter.

A. Yes, I think it has been discussed with Mr. Seeples a number of times.

Q. Has your interest in the matter ever been mentioned in any of those conversations?

A. Yes.

(Testimony of J. C. Hayward.)

Q. Has he ever made any claim to the 19 per cent [72] royalty interests that were in the name of Mr. Scoville? A. Never.

Q. Has he ever made any other claim to the——

A. Not until today.

Mr. Hoge: Your witness.

Cross Examination

Q. (By Mr. Allen): Were you present at the trial of the condemnation action when Mr. Seeples testified as to owning the 19 per cent?

A. I think not.

Q. This was a jury trial before Judge Beaumont, in which Mr. Seeples took the stand and testified as to the ownership of the 19 per cent.

A. I was not present.

Q. You were not present? A. No.

Q. Have you read that transcript at all?

A. I think I have. I don't recall.

Q. That trial was back in 1949, and the transcript was written up, and Mr. Hoge had that transcript, didn't he?

Mr. Hoge: I object. That calls for a conclusion. I will stipulate I had it.

The Witness: I don't recall ever reading it, however. [73]

Q. (By Mr. Allen): You don't recall reading it? A. No.

Mr. Allen: That is all.

The Court: All right. Any further questions?

Mr. Rice: Yes, your Honor.

(Testimony of J. C. Hayward.)

Cross Examinaiton

Q. (By Mr. Rice): Dr. Hayward, I show you a photostatic copy of a letter, dated August 22, 1939, on the letterhead of the Budge Clinic of Logan, Utah, and ask you if that is your signature?

A. No, that isn't my signature.

Q. Is it the signature of anyone in your office?

A. I fancy that is the signature of the secretary.

Q. Would you examine the letter and see if it is a letter which you dictated?

A. Yes, I dictated this letter.

Q. At the time that you dictated this letter, did you confer with Mr. Bullen as to the contents of the letter?

A. Oh, we discussed it, yes.

Mr. Rice: Your Honor, I offer this letter into evidence as the Defendants' Exhibit A.

Mr. Allen: I object to it, your Honor, on the ground it is hearsay, it is a self-serving document, no proper [74] foundation laid, and that the letter is dated or purports to be dated August 22, 1939, which was nearly a year after they had remitted their money in this investment.

The Court: Just a moment. It is his interpretation of the contract,——

Mr. Allen: That is it.

The Court: ——and I cannot see that a letter addressed to a person by the witness, unless it was a part of a discussion of the matter, is material.

(Testimony of J. C. Hayward.)

Mr. Rice: Your Honor, we have lost the original of that letter.

The Court: That isn't the question.

Mr. Rice: No, I understand, but——

The Court: That isn't the point that is being made. The point that is being made is that this is a self-serving declaration. It is his interpretation and is giving directions and ordering from what funds it is to come. In other words, he is deciding this lawsuit for himself.

Mr. Allen: Usurping the powers of the court.

The Court: That is right. Later on, if there had been negotiations and they had agreed upon an interpretation of it, that would be different. Besides, he is ordering something to be deducted from somebody's account, who was not a party to this conversation at all.

Mr. Allen: That is right. [75]

The Court: Objection sustained.

Q. (By Mr. Rice): Mr. Hayward, I show you a typewritten copy of a letter dated January 4, 1940, addressed to Charles S. Gass, Esquire, attorney, in Los Angeles, which purports to be signed by you. Your attorney has stipulated that it may be entered into evidence as far as he is concerned. Will you look at that letter and see whether you wrote that letter?

Mr. Hoge: Counsel, my stipulation was that the copy may be used instead of the original. I waived any objection to that poin' only.

Mr. Allen: Are you offering this?

(Testimony of J. C. Hayward.)

Mr. Rice: I offer this letter, your Honor.

Mr. Allen: January 4, 1940 is the date.

Mr. Rice: I offer this letter of January 4, 1940, as an admission against interest insofar as the defendant Treasure Company is concerned.

Mr. Allen: I have the same objection to it, insofar as Adamant and Scoville are concerned, your Honor. It is an attempt to interpret the situation, it is self-serving, usurping the duties of the court, and hearsay.

The Clerk: That will be Exhibit B, for identification.

The Court: I don't see that this is an admission against interest. It is setting forth a contention made to a third party. [76]

Mr. Rice: The admission, your Honor, is the statement that he is not looking to anyone except Scoville.

The Court: Where is that?

Mr. Rice: May I show you the paragraph? I don't remember the paragraph.

The Court: Yes, show me where the paragraph is.

Mr. Rice: It is the next to the last sentence, your Honor, in the last paragraph. If he asserts an interest against Treasure Company, that is an admission against interest.

The Court: It may be received for the purpose only of whatever that may amount to. It is a possible admission of a contention that is contrary to the contention that he is making now.

Mr. Rice: Your Honor, on that ground would

(Testimony of J. C. Hayward.)

it be possible to have the other letter admitted, on that narrow ground of an admission against interest by the statements contained therein?

Mr. Allen: I don't think it is.

The Court: All right.

Mr. Rice: I was wondering if the other letter, on the same narrow ground, could be admitted?

The Court: I don't remember a similar thing there.

Mr. Rice: Could I see that letter, Mr. Clerk?

The Court: I don't remember anything similar to that there. [77]

Mr. Allen: I don't, either.

Mr. Rice: I had reference, your Honor, to the opening phrase in the next to the last paragraph, "This in no way makes you responsible."

The Court: Let me see it.

(The document was handed to the court.)

The Court: I think for that limited purpose that paragraph may be admitted, merely as implying a different contention than is being made now.

Mr. Rice: Thank you, your Honor.

(The documents referred to were marked Defendants' Exhibit A and Exhibit B, respectively, and were received in evidence.)

The Court: All right.

Mr. Rice: That is all.

The Court: Anything further from this witness?

Mr. Hoge: I believe not, your Honor.

(Witness excused.)

The Court: Let's have a short recess now before you call the next witness.

(A short recess.)

The Court: All right, gentlemen.

Mr. Hoge: May it be stipulated at this time that this well produced about \$200,000 worth of oil in gross production after the investment made by the plaintiffs in intervention, [78] and before the condemnation of the property by the Government?

Mr. Rice: Yes, I think, Mr. Hoge, it was a little over \$200,000.

Mr. Allen: I will stipulate it was \$205,411.68.

The Court: Then you have it in dollars and cents.

Mr. Allen: That was in the hearing, your Honor, and that all of those monies were handled by Treasure Company and Mr. de Bretteville.

The Court: All right.

Mr. Hoge: My only purpose is to show that there was sufficient production to repay this investment out of the 15 per cent of the production of the well.

The Court: All right.

Mr. Hoge: Now, your Honor, there was some testimony in the hearing before Judge Westover by Mr. Halverson, to whom this letter agreement was addressed, Plaintiffs in Intervention B-1, the one that provides for the terms on which their investment was made, and we have a stipulation here to the effect that any testimony in that matter may be used as if it were his deposition in this case. I

did not want to clutter the record with the entire testimony.

The Court: Then you will have to pick out the portions and read them into the record.

Mr. Hoge: Yes, if you want me to, or I could simply refer to Mr. Halverson's testimony, and ask that it be [79] considered as a part of this. It isn't very long, and I will do whatever your Honor would think would be most convenient.

The Court: It does not matter. It all depends on whether there are a lot of extraneous matters. If it is brief, and there are not any extraneous matters, why, the deposition may be put into evidence, especially if there are no objections to any of the questions. If there are objections to any of the questions, it will have to be read, so that I can pass on the objections.

Mr. Allen: I don't recall a stipulation as to Mr. Halverson's testimony that I made.

Mr. Hoge: Mr. Allen, you stipulated that any part of the testimony in the condemnation case might be used in this case as if it were taken by deposition in this case. Do you recall that?

The Court: Let us identify it. That is too general, because how would I know which portions, unless my attention is called to it specifically in some manner, so that the record will show?

Mr. Hoge: Mr. Allen is questioning my statement about the stipulation, your Honor. I think I had better get him cleared up on that first, if I may.

Mr. Allen: I don't recall it, but possibly if you would read the part you want, I will stipuate.

Mr. Hoge: You have already stipulated, Mr. Allen. [80]

Mr. Allen: You mean in writing?

Mr. Hoge: Yes, sir. There is my copy of it (handing document to counsel).

Mr. Allen: Maybe you put one over on me.

Mr. Hoge: No, I don't think so. I believe the original is on file.

The Court: What is that?

Mr. Hoge: I think the original stipulation is on file.

The Court: If you have the copy of it, and you give the date of it, Mr. Stacey will help you locate the original.

Mr. Hoge: December 27, 1954.

Mr. Allen: Yes, I did. I admit that is my signature, your Honor.

The Court: Then that settles it.

Mr. Allen: That is right.

Mr. Hoge: This testimony of Mr. Halverson, your Honor, is at——

The Clerk: Where is it located, so that the Judge can find it?

Mr. Hoge: It is in Volume 3 of the record on appeal in the condemnation case. It commences on Page 1236.

The Clerk: Do we have it in the file?

Mr. Hoge: I don't know, sir, whether you have it or not. I will be glad to let your Honor have my copy of it.

The Court: It does not matter. If you are going to [81] read it into the record, I don't have to take the time to read it now, but if we are going to receive it, we will have to have a copy for the clerk.

Mr. Hoge: Yes, sir.

The Court: I will let you read it into the record.

Mr. Hoge: I am willing to give a copy to the clerk, if you want, or whichever your Honor thinks is appropriate.

The Court: I don't know. How long is this? It just depends on the time, that is all. How many pages is it? Why don't you pick out the portions you want, and probably we would gain time.

Mr. Hoge: It is only about seven pages of the record.

The Court: What?

Mr. Hoge: It is only about seven pages of the record.

The Court: Then why don't you read it?

Mr. Hoge: All right, sir.

The Court: Then I will get the continuity of it.

Mr. Hoge: Should I read both the questions and the answers?

The Court: Yes, that is right.

Mr. Hoge: All right, sir.

Mr. Allen: Do you object to my standing here?

Mr. Hoge: No.

(Thereupon the portion of the deposition of George Halverson referred to, was read in words and figures as follows, to wit:) [82]

(Deposition of George Halverson.)

“Q. (This is by Mr. Hoge): Mr. Halverson, do you recall in the Fall of 1938 whether or not you represented Mr. Water Scoville and The Adamant Company in any matters?

“A. I think it was a little earlier than that. I think it was as early as June. I am not sure. That was 1938.

“Q. I wish to show you Petitioner’s Exhibit 1 in this matter, which is a carbon copy of a letter to you, dated September 27, 1938.”——

That is Exhibit B-1 in this case, your Honor.

“A. I have seen this and read it over, and I am sure the original was in my possession, and possibly in my possession now somewhere.

“Q. Have you made a search of your files?

“A. I made a search on your behalf.

“Q. Were you able to locate the original of that?

“A. I was not able to locate it. I spent a half day looking up my old file and found the old file, but that letter was contained in my safe.

“Q. You were not able to find the original?

“A. No.

“Q. Do you recall having the original, however?

“A. I recall, without question.

“Q. I call your attention to the back of this letter, [83] the botton, on which is the statement, ‘We agree to the foregoing,’ and under that there appears to be certain signatures, and copies of sig-

(Deposition of George Halverson.)

natures. Will you state whether or not you recall what was on the original of that letter?

"A. Yes, sir, they were on the original. I am not sure whether they were on the original as it came to me, or whether it was signed afterwards in my office. My impression is it was before it came to me, but I am not sure as to that.

"Q. You will note there are two, in fact, there are three signatures there, Mr. Halverson, one of Mr. Walter B. Scoville, one of Walter B. Scoville Company by Walter B. Scoville. Do you recall whether they were on the original when you got it?

"A. My remembrance is that they were, Walter B. Scoville, The Adamant Company, Walter B. Scoville, and I believe the Walter B. Scoville Company, although I don't recall it. I have the old complaint that I had prepared at that time, and now in my hands or in my possession. I think there were three parties.

"Q. I call your attention to Petitioners' Exhibit 9 in this matter, the second paragraph of that letter, which states,—this is a letter from you to Messrs. Young & Bullen: [84]

"'We have also under date of September 27, 1938, a letter addressed to us by Herschel Bullen and J. C. Hayward, directing on what terms the checks were to be turned over to the Treasure Company, and we merely had The Adamant Company and the Walter B. Scoville Company and Walter B. Scoville agree to the terms contained in that letter.' Is that a correct statement?

(Deposition of George Halverson.)

"A. That is a correct statement, I am sure. That is my signature, and I am sure the facts contained therein are true.

"Q. Will you state whether or not you can testify that the signature of The Adamant Company, by Helen Scoville, secretary, was on the original of that? "A. I can.

"Q. What is your answer to that? Was it or was it not? "A. It was on it.

"Mr. Hoge: That is all.

"The Witness: Of course, I didn't see her write it, but I know it was there.

"Q. (By Mr. Hoge): You saw the signature?

"A. It was produced by Mr. Walter B. Scoville.

"Q. Do you know Mrs. Scoville's signature?

"A. I don't think I know Mrs. Scoville. I know her father very well, but I don't think I know Mrs. Scoville. [85]

"Q. Do you know her signature?

"A. I wouldn't say that I do.

"Q. You say it was produced by Walter B. Scoville and The Adamant Company. What did he tell you about it, if anything?

"A. He just told me that was, I am sure, that it was the signature of The Adamant Company, by his wife, Helen Scoville.

"Q. Did he say anything to you in that connection?

"A. I can't remember that far back.

"Mr. Bodkin: It was stipulated yesterday that

(Deposition of George Halverson.)

that was her signature, and she was authorized to bind the company, according to my recollection.

“Q. Mr. Halverson, may I ask you, referring again to this letter,”—this is a question by Mr. Hoge again—“Petitioners’ Exhibit 9 from Messrs. Young & Bullen, I ask you to read that second paragraph. “A. Yes, sir.

“Q. Can you state that you had in your possession the original of that document, signed and executed by The Adamant Company?

“A. It was on the letter from Herschel Bullen and Dr. Hayward, on the bottom of the letter. Yes, I had the original letter in my possession for many years, I know that. [86]

“Q. And did it have what purported to be the signature of The Adamant Company, by Helen Scoville, upon it?

“A. It did, yes, sir.

“Mr. Hoge: That is all.

“Cross Examination by Mr. Bodkin:

“Q. At the time that these letters you have referred to were written and received by you, were you representing Scoville and The Adamant Company?

“A. I was. I was representing—I have forgotten the title of the case that was brought, but the first case that was brought for declaratory relief. I went to your office, met with Walter B. Scoville, met Mr. de Bretteville there, and we discussed the question of compromise and the terms somewhat, the terms of resuming work on the well.

(Deposition of George Halverson.)

“Q. But later on that original case which you had filed as attorney for Scoville and The Adamant Company was dismissed?

“A. It was dismissed, yes.

“Q. And then some new arrangement was worked out at that time?

“A. A new arrangement was worked out before dismissal.

“Q. When that new arrangement was worked out, the [87] case was dismissed?

“A. Yes.

“The Court: Might I ask counsel a question?

“Mr. Hoge: Yes, sir.

“The Court: You have the letter signed by Scoville and by these corporations. Is there any record of any resolution authorizing anybody to sign these letters to bind the company in any way?

“Mr. Hoge: I don't know, your Honor.

“The Court: You bring in a letter by which you are attempting to bind the corporation. It seems to me before you bind the corporation you have got to show that party has the authority to bind the corporation. The usual way is to show a resolution by the Board of Directors; I don't know, or you might show a manager that had authority to bind the corporation.

“Mr. Hoge: In addition to that, your Honor, there is the fact that the corporation received the benefit.

“The Court: That is argument, but as far as

(Deposition of George Halverson.)

the record shows, there is no official action by the corporation.

“Mr. Hoge: That is correct, your Honor.

“Redirect Examination by Mr. Hoge:

“Q. Mr. Halverson, you say you represented Mr. Scoville and also represented The Adamant Company at that [88] time? “A. I did.

“Q. Do you know anything about the stockholdings of The Adamant Company at that time, and the officers of it?

“A. Helen Scoville was the president, and I don't recall who the other officers were at the present time.

“Q. Who owned the stock? “A. How?

“Q. Who owned the sotck of the company?

“A. It was my understanding she owned practically every share of the stock.

“Mr. Hoge: I think that is all.

“Mr. Bodkin: No further questions.

“Mr. Rice: Your Honor, yesterday afternoon I understood you had ruled that questions by Mr. Bodkin would serve both R.F.C. and Treasure Company. I was not present. There was an R.F.C. representative, and a deposition was taken, and so I thought it was not incumbent upon me to make the objections. Now that new evidence is being put on, I want it understood I don't have to go through the same procedure Mr. Bodkin has gone through.

“The Court: I am considering the two of you as one. You have to ride the ball in each case. I

(Deposition of George Halverson.)

don't think [89] you have more rights than he has.

"Mr. Rice: We don't assert any more, your Honor.

"Mr. Hoge: There is one more question I would like to ask.

"Q. I show you, Mr. Halverson,—

"The Court: The checks speak for themselves. There is no dispute as to where the money went.

"Mr. Hoge: But, your Honor, you reminded me of this question on what our position was.

"The Court: All right.

"Q. (By Mr. Hoge): Plaintiffs' Exhibits 3 and 4, do you recall seeing those documents?"

Off the record, your Honor, I offer this explanation, those are the two checks that are in evidence here as B-3.

"A. I recall seeing them. I saw them just before getting on the witness stand here. That is my signature and endorsement on the back in my handwriting in green ink.

"Q. Did you deliver those checks to anybody?

"A. I am not sure who—yes, I did.

"Q. Do you recall to whom you delivered them?

"A. I think I delivered them to Mr. Wynn, but I am not dead sure, but I know I made the endorsement on there to Treasure Company.

"Q. You had discussions with Walter Scoville about [90] this matter of delivering those checks, did you? "A. Yes, certainly.

"Q. Were they delivered to Mr. Wynn, or who-

(Deposition of George Halverson.)

ever got them, with the approval and consent of Mr. Scoville?

"A. I am certain they were."

Now, your Honor, there is a deposition which has been taken in this case of Mr. Walter Scoville. I understand he is not present here, and there are parts of that deposition which I would like to introduce also.

The Court: All right. Have you opened the deposition, Mr. Stacey?

The Clerk: No, your Honor. It is under seal.

The Court: Open it, please.

(The deposition referred to was opened by the clerk.)

The Court: All right.

Mr. Hoge: This deposition, your Honor, is about 27 pages long. As far as I am concerned, I would stipulate that it go in, on the understanding that it is the examination of an adverse witness insofar as I am using it, or, if your Honor would rather have me pick out the parts I particularly want, I would do that.

The Court: Examination of an adverse witness is not helpful unless you secure some admissions. Merely examining a man under Section 43 (b) or 2055 of the California Code of Civil Procedure is not helpful in itself. If there are any [91] admissions there——

Mr. Hoge: There are some there. That is what I want it for, your Honor.

The Court: Then the best way is to pick them out.

Mr. Hoge: Very well, your Honor.

The Court: Then they are in the record, you know, and unless they are contradicted, why, I can base a finding on them. So it is important to pick out what you want.

Mr. Hoge: I am sorry to take a little time, your Honor, but the reporters through some oversight of some sort did not provide me with a copy. I was not present when it was taken.

Mr. Allen: I was wondering, your Honor, since the deposition has been taken and perhaps the plaintiffs will have to tender it for any part they do not read, that——

The Court: I am willing to take it and read it, and I can read it very fast, but where he offers it merely under 43 (b), he may not want it all. If he wants to offer it in its entirety,——

Mr. Hoge: I think I will leave that to Mr. Allen. I have picked out a section at Page 24.

Mr. Allen: I think I will offer it in evidence, your Honor, and that will provide the entire testimony of Mr. Scoville. I will offer the entire deposition.

Mr. Rice: Your Honor, shouldn't it be read so that we can make any objections that we desire?

The Court: If you desire to object, yes.

Mr. Rice: I haven't had a chance to read it yet so as to determine whether I want to object.

The Court: Why don't you take it, and if there are any important admissions that you want, you

read them, and then you can offer it later on. I think that is the better way. For me to take it in its entirety, there has to be a waiver of objection, gentlemen. In other words, to use a homily expression, I think it is never a good judicial practice to "buy a pig in a poke," and if you take a deposition, and there are objections, and you do not pass on them, you are doing exactly that. Therefore, I think there should be a waiver. For instance, you know in admiralty cases many a time half of the testimony is by way of deposition, and we don't take the time to read them sometimes until a matter of some two or three months after they have taken the oral testimony, and that is the rule we apply.

Mr. Hoge: There are only three pages I want particularly, your Honor.

Mr. Rice: What page are you starting on?

Mr. Hoge: I am starting at Page 24. There had been some testimony with regard to conversations between Mr. Wynn and Mr. Seeples about raising money. This question begins on Page 24.

(Deposition of Walter Scoville.)

"Q. Then where was the next conversation you had [93] with Mr. Wynn and Mr. Seeples concerning the raising of funds?"

That is about the middle of Page 24.

"A. We were in constant touch"—this is Mr. Scoville's testimony, your Honor—"We were in constant touch with one another because that was all I was down there to do. After they received the authority to go ahead, we, Mr. Seeples and Mr.

(Deposition of Walter Scoville.)

Wynn and myself, definitely formulated plans of activity. We had formed the plans of securing credits, under the direction of Mr. Seepie and Mr. Wynn, and when that was accomplished and signed by the Treasure Company, we started raising cash funds for the project.

“Q. Were both Mr. Seepie and Mr. Wynn in agreement on this plan to pay back two for one on all funds raised?”

Mr. Rice: Your Honor, I will object to that question insofar as Treasure Company is concerned on the ground it is hearsay.

The Court: It is being admitted only as to the persons concerned.

Mr. Hoge: (Continuing reading:)

“A. Definitely.

“Q. Following these conversations in Los Angeles with you and the Committee of whom Mr. Seepie and Mr. [94] Wynn were members, did you then return to Utah? “A. Yes.

“Q. When was that? “A. In July.

“Q. Following your return to Utah is when you began negotiating with Mr. Bullen and Dr. Hayward? “A. Yes.

“Q. Following your negotiations with Mr. Bullen and Dr. Hayward, did Mr. Bullen then write this letter to Attorney Halverson which set forth terms of this agreement?

“A. No, that was in September.

“Q. It was following your visit with Mr. Bullen?

(Deposition of Walter Scoville.)

"A. He wrote the letter in my presence and Dr. Hayward's presence in Logan.

"Q. I understand, Mr. Scoville, a copy of that letter-agreement which has been referred to is on file having been attached as Bullen and Hayward in intervention in this matter.

"A. I understand so but I don't know. I have no way of telling."

Here again, your Honor, he is talking about Exhibit B-1, the letter of September 27, 1938.

The Court: All right.

Mr. Hoge: (Continuing reading:) [95]

"Q. When you said you okehed it, did you actually subscribe your name to it?

"A. Yes, right on the letter.

"Q. Did the Adamant Company also okeh that letter?

"A. Yes indeed. We okehed the terms and conditions under which those monies should be turned over.

"Q. Can you recall who signed for the Adamant Company at that time?

"A. No, I cannot.

"Q. I believe the document shows Helen Scoville signed for the Adamant Company. Was she an officer at that time? "A. She was.

"Q. Were you an officer?

"A. No, I have never been.

"Q. Who were the stockholders at that time?

"A. All of my children. It was formed in 1935 as an organization of the family.

(Deposition of Walter Scoville.)

“Q. Who is Helen Scoville?

“A. That is one of my daughters.

“Q. Were you present when she signed?

“A. I do not know.

“Q. You do know the Adamant Company agreed to it? “A. She had authority.

“Q. I believe in addition to signing for yourself, [96] you also signed for the Walter B. Scoville Company.

“A. That is right. The reason for that was I had given Mr. Bullen this agreement on Baxter Basin on 80 acres in the event this well did not produce and that belonged to the Walter B. Scoville Company.

“Q. So you put both the Walter B. Scoville Company and yourself in your individual capacity?

“A. That is right.

“Q. I believe you have testified, but I want to make sure, that you are not presently aware of the payment of the checks sent to Mr. Halverson by Mr. Bullen and Dr. Hayward to the Treasure Company.

“A. I was advised by Mr. Seepie that Mr. de Bretteville had received them.

“Q. And that money given was used in making a producer of the well? “A. Yes.”

Now, I have skipped some matters in which I am not particularly interested at this time.

The Court: All right. Go ahead.

Mr. Hoge: Then at the bottom of Page 27:

“Re-cross examination by Attorney Olson:

(Deposition of Walter Scoville.)

“Q. Mr. Scoville, at the time you were having discussions with Mr. Bullen and Dr. Hayward about their investing money, did you advise them that the two [97] for one agreement was with the full knowledge and consent of the Treasure Company?

“A. That is right, through the Committee.

“Q. Through the Committee which Mr. Wynn was representing the Treasure Company?

“A. That is right.”

The Court: All right. Any other documentary evidence of any kind?

Mr. Hoge: No, your Honor. I believe the plaintiffs in intervention rest at this time.

* * * * * [98]

J. ORVILLE SEEPLÉ

called as a witness on behalf of the plaintiffs, having been first duly sworn, testified as follows:

The Clerk: State your name in full, please.

The Witness: J. Orville Seeples.

The Clerk: Spell your last name.

The Witness: S-e-e-p-l-e.

The Clerk: And your address?

The Witness: 1525 North Van Ness.

The Clerk: What city?

The Witness: Los Angeles.

Direct Examination

Q. (By Mr. Allen): Mr. Seeples, what is your business or occupation? A. Oil operator.

(Testimony of J. Orville Seepie.)

Q. How long have you been engaged in that business? A. Thirty-five years.

Q. You have drilled how many wells in the Los Angeles Basin?

A. Oh, from 30 to 50, I don't know, in the Basin.

Q. In the Los Angeles Basin? A. Yes.

Q. Did you have charge of the drilling of this Treasure Well No. 8? [102]

A. I did.

Q. From the beginning of the drilling, or——

A. No, not from the beginning. From about the latter part of 1938.

Q. In the pleadings there is admitted a contract of April 5, 1938, in which you and Mr. de Bretteville are named as an executive committee. Do you recall that? A. Yes, I do. [103]

* * * * *

Q. (By Mr. Allen): Do you recall a meeting at the well some time in the Fall of 1938?

A. Yes, I believe I do.

Q. In which Mr. de Bretteville was present?

A. Yes.

Q. And Mr. Walter Scoville? A. Yes.

Q. And was Ollie Mays present?

A. I believe he was.

Q. And was F. L. Scoville present?

A. I believe he was. I am not sure, though.

Q. Was Attorney Charles Johnson present?

A. Yes.

Q. Now, will you relate, as near as you recall at this [104] time, the substance of the statements

(Testimony of J. Orville Seepie.)

made there by Mr. de Bretteville, and Mr. Scoville, and Mr. Charles Johnson, and those who took part in the conference?

A. There was a discussion as to raising more money to complete the well, and in that discussion it was in regards to the pay-back on a two and one-half or a two for one out of all of the production, or all of the interest, rather, of Mr. de Bretteville, Mr. Scoville, and The Adamant Company; all their interest was to pay back out of 15 per cent to the assignments of these per cents.

Q. They were to pay back out of 15 per cent of what? A. Of all of the production.

Q. All of the production?

A. Yes, all of the production belonging to, we will say, the Treasure Company, or de Bretteville, Walter B. Scoville, and The Adamant Company.

Q. And as to that 15 per cent, then, did Mr. de Bretteville make any statement in reference to that?

A. He didn't like to come in on that pay-back, but he eventually, I believe, he agreed to it.

Q. At that meeting? A. Yes.

Q. By the way, at that meeting do you recall any statement made by the attorney, Charles Johnson, in reference to the meaning of the cooperative clause in the April 5, [105] 1938, contract?

A. Yes. He called attention to the fact that the contract called for cooperation of all parties in interest, in any interests that they had in the completion of the well.

Q. Was anything said about what—what did he

(Testimony of J. Orville Seepie.)

say about that cooperation? What did it consist of?

A. It meant this, that we should all, our particular interests,—

Mr. Rice: Your Honor, I object to that as a conclusion of the witness.

Mr. Allen: Just state what he said.

The Court: What he said, yes.

Q. (By Mr. Allen): What Charles Johnson said with reference to that cooperative clause in the April 5, 1938, contract?

A. Charles Johnson called attention that each one of our interests should participate in the pay-back of that money advanced, as a cooperative situation.

The Court: All right. What was said by the others, then?

The Witness: Mr. Scoville agreed to it, and The Adamant and, finally, Mr. de Bretteville of the Treasure agreed to it.

Mr. Allen: I think that is all. [106]

* * * * *

Cross Examination

* * * * *

The Witness: I had made other—I had worked—done a lot of work for Mr. Walter B. Scoville, and his brothers in Wyoming, and he owed me a debt, and when we first went into this deal in the Treasure Oil Company, I recommended that I thought that we could make a well out of it. Mr. Scoville had had it for three years, and told me—

Mr. Allen: You mean Mr. Scoville?

The Witness: I mean, Mr. de Bretteville had had

(Testimony of J. Orville Seepie.)

it for three years, and he could not keep the hole straight, and needed a lot of money, and he told me his sister, Mrs. Spreckels, wouldn't give him any more money, and wanted to know if I could raise the money. And I told Mr. Scoville about it, who happened to be here at that time from Salt Lake, and he became interested, and he put in \$10,000 the first time, to go down and look at the sand, in other words, to see if it was a producing zone. And we had the Schlumberger run, which showed saturation. Then we needed more money, and in the agreement all parties were supposed to cooperate,—Mr. de Bretteville, Mr. Scoville, and The Adamant Company, to the completion of the well. But we raised part of the money from Mr. Bullen and Dr. Hayward, and some others, and we completed the well. I received no salary whatever.

* * * * * [114]

FRANCIS L. SCOVILLE

called as a witness on behalf of the plaintiffs, having been first duly sworn, testified as follows:

* * * * *

Direct Examination

Q. (By Mr. Allen): Mr. Scoville, are you a brother of Walter B. Scoville? A. I am.

Q. Do you recall a certain conference at the Treasure [117] Well No. 8 back in the fall of 1938?

A. I do.

Q. In the evening, and toward midnight?

A. I do.

(Testimony of Francis L. Scoville.)

Q. Do you recall who was present at that conference?

A. There was Walter B. Scoville, de Bretteville, and Johnson,——

Q. Attorney Johnson?

A. Attorney Johnson, and myself was there, and I know there were five that were there.

Q. You know there were five there?

A. Yes.

Q. Will you relate in substance what was said by Mr. de Bretteville, and Mr. Walter Scoville, and the different ones, and Attorney Charles Johnson, as nearly as you can recall at this time?

A. Well, Mr. Seepie at that time was in charge of the well, and they had gone as far as they could go with the \$10,000 that Walter B. Scoville put up, and they needed more money, and they called the meeting to find out about the raising of more money, and who was responsible for it. And de Bretteville asked Attorney Johnson to read the contract, and to tell them who was responsible for furnishing the money. And this was done, and Attorney Johnson said that they should cooperate, and furnish the money, and after he had done that, [118] that any money raised would be paid back on a two to one percentage. And at that time Walter put up \$1500, as I remember it, at that meeting, and de Bretteville said he would put his up the next morning.

Q. To refresh your memory, didn't Walter put

(Testimony of Francis L. Scoville.)

up only \$500 and say he would put up the other \$1000 when he got back to Salt Lake?

A. Well, that part, I don't know, but at that time he obligated himself for \$1500.

Q. And de Bretteville said the same?

A. And de Bretteville said he would have his in the bank the following morning.

Q. What statement did de Bretteville make in reference to the pay-back of two for one?

A. Well, they wanted to finish the well. The way it stood there, it was doing no one any good, and they wanted to finish the well, and de Bretteville felt that Mr. Seepie was capable of finishing the well, and, consequently,—

Mr. Rice: Your Honor, I object to that.

The Court: What did he say about that?

Q. (By Mr. Allen): What did de Bretteville say about the pay-back of two for one?

A. He agreed to it.

Q. How did he agree to it?

A. He said he would agree to the two for one pay-back. [119] I heard that, and I know that.

Q. Out of production?

A. Out of production from the well.

Mr. Allen: Take the witness. [120]

* * * * *

Wednesday, Jan. 19, 1955, 10 a.m.

J. ORVILLE SEEPLÉ

recalled as a witness on behalf of the plaintiffs, having been previously duly sworn, testified further as follows:

* * * * * [132]

Cross Examination

Q. (By Mr. Rice): Mr. Seeples, I believe you testified yesterday afternoon that you had charge of the drilling operations at Treasure Well for a certain period. Would you tell us what that period was?

A. That period was from the time that we started work on the well until it was completed, and the oil in the tanks.

Q. When did you start work on the well?

A. Some time in 1938.

Q. Well, what time in 1938?

A. I think it was along in April or May. I am not sure. That's a long time ago.

Q. What time did you terminate your activities in connection with the drilling of the well?

A. When Mr. de Bretteville——

Q. Just what time of the year was it—the date?
The Court: He wants a date.

The Witness: Oh, along in December, of 1938.

Q. (By Mr. Rice): Do you remember whether it was the middle of the month, or the end of the month?

A. I believe it was around the middle of the month.

(Testimony of J. Orville Seepie.)

Q. Around the middle of the month?

A. Yes, but I am not positive.

Q. So that your testimony now is that you had charge of the drilling operations at Treasure Well from some period in April or May of 1938 up until a date in the middle of December, 1938; is that right?

A. As far as I remember.

Q. Now, were you continuously in charge of drilling operations of Treasure Well during the period we have just talked about?

A. Yes.

Q. In other words,—

A. Until the completion of the well.

Q. You were there, then, from the beginning date, which we will say was April or May, and you can't tell me any more definitely when you took over the job there, the commencement date?

A. There was an interval in between the time that the contract was made,—

Q. Which contract are you referring to?

A. —when no work was done.

Q. Which contract are you referring to? [134]

A. The contract between The Adamant Company, Scoville, and the Treasure Company.

Q. Is that the contract which is known as the April 5, 1938, agreement?

A. I believe it is.

Mr. Rice: That has been introduced into evidence by you, hasn't it?

Mr. Allen: It is in the pleadings, and admitted anyway, Mr. Rice. * * * * * [135]

Q. Now, at this meeting that I think you testified yesterday you attended, Mr. Scoville you say

(Testimony of J. Orville Seeples.)

was present, that is, Mr. Walter B. Scoville from Salt Lake City?

A. He was present at what date?

Q. At the meeting, Mr. Seeples, that you described yesterday afternoon.

A. Yes, he was present at our meeting.

Q. And I believe you testified yesterday that at that meeting there was an agreement reached to raise funds for the completion of the well on the two for one basis; is that right?

A. There were several matters discussed.

Q. Just answer that question for me, Mr. Seeples.

A. Yes.

Q. That agreement was reached at that meeting, and that agreement was reached between whom? Would you tell me between whom the agreement was reached?

A. Mr. de Bretteville and Mr. Scoville.

Q. And was Mr. Scoville,—I believe that Mr. Scoville, you have testified, is the trustee for your beneficial interest; is that right? [143]

A. That's right.

The Court: By the way, there are no pleadings whereby Mr. Seeples seeks in any fashion to have that fact established, are there?

Mr. Rice: I don't know, your Honor.

Mr. Hoge: No.

The Court: I beg pardon?

Mr. Hoge: He is not a party to this action, I believe.

(Testimony of J. Orville Seepie.)

The Court: I just wanted to make sure of that.

Mr. Hoge: Yes.

The Court: So that whatever agreement they have in regard to it is between them and does not require a ruling?

Mr. Hoge: It does not require a ruling here, yes, your Honor.

The Court: It does not require any ruling in this case. All right.

Mr. Allen: That is right.

Q. (By Mr. Rice): Did Mr. Scoville in discussions with you subsequent to this meeting confirm that it was his understanding that the agreement had been reached at that meeting on the two for one deal?

A. I don't remember whether it was at that particular meeting or not, on the two for one.

Mr. Rice: I thought you testified just a moment ago that that was—you testified to that yesterday, and I thought [144] you just reaffirmed your testimony, that at that meeting the two for one discussion took place.

The Court: There is a letter in longhand written by Mr. Scoville, which was produced yesterday, and I don't know whether it is dated subsequent to that meeting, in which he stated he felt an agreement had been reached as to all differences.

What is the number of that exhibit? That is an exhibit I read this morning.

It is Exhibit B-2, and it is dated October 20, 1938.

(Testimony of J. Orville Seepie.)

Was this meeting before October 20, 1938?

The Witness: Yes, it was.

The Court: He says, "It has taken a long time to get to this point, but barring any slips now, we will get started Saturday."

And he also says, "Just today we had our audience with Mr. Bodkin. He is agreeable to all procedure as we have outlined. There will be a final meeting tomorrow at 10:00 a.m. at which meeting all documents will be signed, the suit dismissed, the monies paid over and we will proceed in a peaceful, harmonious manner to complete the well."

So evidently that was his impression after this meeting. All right, go ahead.

Mr. Rice: May I see that just a moment, your Honor?

The Court: Yes. [145]

(The document was handed to counsel.)

The Court: It escaped me yesterday. I don't know whether you produced it, and I just didn't look at it. I don't think there was any objection and that is the reason, I think, that I did not look at it. I only looked at those as to which there was an objection. As I say, I examined it this morning, and that is evidently his summary on the topic. It does not mean anything, except that he says he felt that all differences had been adjusted.

Mr. Rice: This letter does not show to whom it is addressed. It says, "My Dear Friends."

Mr. Hoge: The testimony is that it was ad-

(Testimony of J. Orville Seeples.)
dressed to Mr. Bullen and Dr. Hayward, your Honor.

The Court: That is right. I don't know whether Dr. Hayward or Mr. Bullen so testified.

Mr. Hoge: Mr. Bullen testified.

The Court: Yes, Mr. Bullen testified. It was right at the beginning because it is Exhibit 2.

Q. (By Mr. Rice): This meeting, then, took place prior to this letter of October 20, 1938, Mr. Seeples? A. Yes, it did.

Q. Mr. Seeples, did you ever undertake to act for Mr. Scoville or for The Adamant Company in this activity of finding the funds to refinance this,— I mean to complete the well? [146] A. Yes.

Q. You did. And it is your testimony that this two for one arrangement was agreed to by Treasure Company, as well as by Mr. Scoville; is that right? A. It was agreed to, yes.

Q. That Treasure Company agreed with Mr. Scoville that monies that he could produce would be repaid out of the well two for one; is that right?

A. Yes, he agreed to it.

The Court: I have forgotten, but who appeared for Treasure Company at that meeting? Who spoke for Treasure Company?

The Witness: Mr. de Bretteville.

Mr. Kolliner: The testimony is that it was Mr. de Bretteville.

Mr. Rice: Mr. de Bretteville, your Honor.

The Court: Mr. de Bretteville. All right.

Q. (By Mr. Rice): Mr. Seeples, I show you a

(Testimony of J. Orville Seepie.)

photostatic copy of a letter, dated November 2, 1938, addressed to the Treasure Company, and bearing certain signatures. I will ask you if that is your signature? A. That is my signature.

Q. And those signatures are, "J. Orville Seepie," and "Walter B. Scoville, by J. Orville Seepie, His Agent," and "The Adamant Company, by J. Orville Seepie, Its Agent," is [147] that right?

A. That is right.

Mr. Rice: Your Honor, I would like to offer this in evidence as Defendants' Exhibit 2.

Mr. Allen: I object to it on the ground——

The Clerk: Defendants' Exhibit C.

Mr. Rice: "C", is it?

The Clerk: Yes.

Mr. Allen: ——on the ground that it is dated November 2, 1938. The document was introduced in evidence before in the trial in Judge Vickers' court, and is an exhibit in that case, and those files are here in this court, that is, the transcripts, and it was passed upon, and it is *res judicata*.

Mr. Rice: Your Honor, I am offering this letter for purposes of showing an admission against interest on the part of this witness, in that he has written that funds would be made available for the completion of the well, which we will show is a part of the——

The Court: Regardless of any question, it is admitted as proper cross examination, as possibly contradicting his statement as to who will make the monies available. The assumption is made here that

(Testimony of J. Orville Seepie.)

Seepie signs not only for himself, but also for Scoville. In fact, he signs for all three.

Mr. Allen: Yes, I know.

The Court: So it is a contemporaneous document that may [148] contradict what he says now, just as yesterday's document, produced by Dr. Hayward, shows that it could be interpreted as contradicting his statement on the witness stand, because in that letter he says that "We will hold Scoville personally responsible," despite the fact that he has tried to make us believe that all of the others are in on it.

I want to say this, gentlemen. I am going to follow very completely the rule of *res judicata*, and the things that have been adjudicated either by the other court or by Judge Westover will not be gone into again——

Mr. Allen: That is the point.

The Court: ——except as to such matters as to which parties were not before one or the other of the courts.

But on this point the question does not arise. It is merely that this is contradictory of his present statement. Furthermore, it shows that he was signing for everybody. So when he speaks of others agreeing to it, evidently he meant that he agreed, because here is Seepie talking for himself, and here is Seepie talking for Scoville, and here is Seepie talking for The Adamant Company.

Mr. Allen: Well, the agreement would be furnished under the agreement of the two for one.

(Testimony of J. Orville Seepie.)

The Court: I am not talking of the effect of it. Here is a man appearing in a triple capacity right here. Therefore, it may contradict what he is saying now as to what the [149] others said independently.

Why did not the others sign if they participated in this? Why did he sign for all three? Why didn't Scoville sign for himself, and why didn't Adamant sign through somebody else except this person? So this has a bearing upon his testimony.

It may be received.

The Clerk: Defendants' C.

(The document referred to was marked Defendants' Exhibit C, and was received in evidence.)

* * * * * [150]

GUSTAV de BRETTEVILLE

called as a witness under the provisions of Rule 43(b) of the Federal Rules of Civil Procedure, having been first duly sworn, testified as follows:

Direct Examination

* * * * * [157]

Q. (By Mr. Allen): Was Ina Cowan Kupper-schmid employed by you? A. That's right.

Q. When? About when?

A. She was employed between—she never was employed by me. She was employed by the Treasure Company, and I think in 1934 or '35, through to about somewhere in '38.

(Testimony of Gustav de Bretteville.)

Q. What were her duties?

A. She was secretary.

The Court: May I ask what is the object of this inquiry?

Mr. Allen: Going into alter ego, your Honor.

The Court: What?

Mr. Allen: Going into alter ego.

The Court: What has alter ego got to do with this?

Mr. Allen: It is this, that he is a defendant here, and he operates these matters through his corporations, but he has full control of them, and as this one exhibit shows, he has a power of attorney to manage the corporation, with the duties that revolve to the directors. [163]

The Court: What *has to* do with the issues? What difference does it make whether it is his alter ego or not?

Mr. Allen: For this reason, that if there is a judgment, in order to reach things that we can show that he used this corporation for his own personal affairs.

The Court: That would release the corporation and make him personally liable.

Mr. Allen: Yes, and I think that is what we would like to do.

Mr. Hoge: May I say, as I understand the bearing of it, your Honor? May I mention that? I am interested with Mr. Allen, because we hold two per cent of the participating royalties. But, as I understand it, after this accounting was made by the

(Testimony of Gustav de Bretteville.)

Master, some of the physical assets that had been purchased out of the production of this well were sold by Treasure Company, and to complete the accounting the purchase price should be accounted for to the royalty holders, because their money, their pro rata portion of the money had paid for those assets, you see. So I think we are entitled to a judgment against Treasure Company for the value of those assets, or that it should be an item in the accounting. Now, if it appears that the Treasure Company does not have the money, and Mr. de Bretteville has it, I think that should be gone into.

The Witness: Oh, nothing like that happened.

Mr. Hoge: I don't know the facts, but I am stating the theory on which we are proceeding.

The Court: There was no objection, but I wanted to know how far we were going into the matter.

Mr. Allen: To show his complete management.

The Court: I want to tell you so far as alter ego is concerned, where a man has a directorate and he runs it as a corporation, and pays taxes as a corporation, that it is only in tax matters that you can disregard the corporate entity. You have to show that they had no will of their own, and received nothing, and so long as there are others who received dividends, if they were available, the alter ego theory does not get you anywhere. It is only in tax cases that you can disregard it, because under the law of California, which would govern,

(Testimony of Gustav de Bretteville.)

the mere fact that he has absolute control would not in itself be sufficient, but you would have to show that the others did not have a definite right to the stock, and that it was really a means adopted by him.

I just want to warn you that I am familiar with the doctrine. That is why I was asking the question. The mere fact that he was the moving head and had a power of attorney does not make the corporation his alter ego. The corporation still exists as an individuality.

Mr. Allen: I understand, your Honor.

The Court: And that is so even in tax cases. The best [165] proof of that is the opinion that I wrote in the F. Hugh Herbert case, where I held that even for tax purposes it could not be disregarded, and that the entity exists where separate books are kept and reports are made, such as required. For instance, I noticed among the exhibits the income tax returns were made by the corporation. When that is of record, you cannot get very far on the theory of alter ego. You might get somewhere on the theory that they have wasted the assets, you know, without consulting, and that is a different proposition.

Mr. Allen: I think I can even do that.

The Court: But so far as alter ego is concerned, I will give you this case. It is United States vs. F. Hugh Herbert, I believe. There the two men controlled the corporation, and the Government disregarded it, but it appeared they organized it, and

(Testimony of Gustav de Bretteville.)

although they were in absolute control I held they had to be recognized. Of course, the Government has greater powers to disregard a corporate entity for taxation purposes than this court would have by holding a corporation which is organized under the State law not to be a corporation.

I will give you the correct citation of that case. It is the case of *F. Hugh Herbert vs. Riddell*, 103 Fed. Supp. 369.

Mr. Allen: Your Honor, I think I can show you where it is very material here if you will permit me to go ahead. [166]

The Court: All right.

Q. (By Mr. Allen): In what capacity was Ina Cowan Kopperschmid employed, —as secretary?

A. That's right.

Q. And was she a director of the company?

A. I am not sure. I think so.

Q. Yes. A. I think so.

Q. Do you recall this, that when she was appointed director of the Treasure Company that you had her sign a resignation as director and hand it to you at the same time?

A. No, I don't recall that.

Q. You recall her testimony, do you not, in the State Court in June in the Wynn case——

A. No, I don't.

Q. ——in which she made that statement?

A. No, I don't recall that, no.

Q. You don't recall that? A. No.

Q. Did you have E. Vaughn appointed a direc-

(Testimony of Gustav de Bretteville.)

tor of Treasure Company? A. I don't recall.

Q. You know, don't you, that you had E. Vaughn, your housekeeper, appointed director?

A. I am not sure. [167]

Q. How long was she with you?

A. Well, that I couldn't say.

Q. Do you remember testifying to that effect in June in the State Court, that E. Vaughn was a director of the Treasure Company?

A. No, I don't recall that.

Q. Just last June? A. Yes.

Q. Well, E. Vaughn was your housekeeper, was she not? A. Yes, that's right.

Q. And M. Jones was also a director, was she not? A. Yes, that's right.

Q. Did you appoint Harry Wynn a director?

A. I think that the company appointed Harry Wynn a director.

Q. And were you a director yourself?

A. That's right.

Q. While Harry Wynn was a director, isn't it a fact that no directors meetings were held?

A. Oh, we held meetings when Harry Wynn was a director.

Q. Did you ever hold a meeting with Harry Wynn as a director? A. That's right.

Q. You did? A. Yes, that's right. [168]

Q. When?

A. Oh, I couldn't tell you. We conducted the affairs of the corporation. When Harry Wynn was friendly to the corporation, from the time that he

(Testimony of Gustav de Bretteville.)

first came to work until somewhere in the latter part of 1938, or the fore part of 1939, or perhaps it was 1939, the latter part of 1939. I'm not sure.

Q. You passed on all of the bills of the Treasure Company, did you not? A. I usually did.

Q. Do you recall testifying in June in the State Court action that you never looked at the Treasure Company's books?

A. We employed an accountant, and I don't know—I have never had any training in accountancy, and I simply left it all to Mr. Moore, who was the accountant.

Q. You didn't look at the books?

A. I never interfered with him at any time.

Q. You didn't look at the books?

A. Perhaps if Mr. Moore called a particular item to my attention, or I asked about it, that would be the only time.

Q. I show you a resolution in Plaintiff's Exhibit 2, which is the audit of Claude I. Parker, on Page 2, that sets out the following:

"On June 24, 1938, at a directors' meeting held [169] and signed, I. Cowan, Secretary, the following resolution was adopted:

"Be it resolved that G. de Bretteville, the President of the corporation is hereby authorized, empowered, instructed and directed in the name and under the seal and as an act and deed of this corporation, to use and take all lawful ways and means in the name of the corporation or otherwise, to bargain, negotiate, contract, agree for, purchase,

(Testimony of Gustav de Bretteville.)

receive and take lands, tenements, hereditaments, and accept the seizing and possession of all lands, and all deeds and assurances in the law therefor, and to lease, let, demise, bargain, sell, remise, release, convey, mortgage and hypothecate, and in any way or manner deal in and with goods, wares and merchandise, equipment, tools, machinery and personal property, bills, bonds, stocks, notes, receipts, royalties, working interests, percentage interests, evidences of debt and such other instruments in writing of whatsoever kind and nature as may be necessary or proper to the premises. Also to negotiate loans, and borrow money with or without security; giving to the President, G. de Bretteville, full power and authority to do and perform every requisite necessary in his judgment as this Board of Directors would or could do."

Mr. Kolliner: I am going to object to the question, your Honor, on the very ground your Honor has indicated, that it is irrelevant whether the corporation did give him such authority.

The Court: He may ask the question. It may be received.

Q. (By Mr. Allen): Did you act under that?

The Court: Gentlemen, I still cannot see this. I have looked over the pleadings and I looked over the intervention, and I was just examining Judge Hall's memorandum on intervention. There are only two issues in this case. We have no power in a case, and the Federal Government has no right of visitation on corporations. You cannot dissolve

(Testimony of Gustav de Bretteville.)

a corporation. There are only two things in this lawsuit. First of all, there is an accounting, and the object of the accounting is twofold. An accounting may be asked where officers of a corporation have failed to account to persons who have an interest. Then we have them account. The other object is to determine what portion of the expenses should be deducted from the amounts found to be due by Judge Westover, so that the exact amounts may be determined.

We held in that opinion that the court cannot make an award. In that particular case the court could not make an award because there were equities between the parties which had not been gone into and which are the subject or the object of this lawsuit. So that the award was frozen. Not that Judge Westover could not have gone into the equities [171] of the thing in those proceedings before him, but the fact is he did not. So that a court of equity would go into the matter and determine what equities there are. As the opinion says, they may be entitled to receive more, or they may be entitled to receive less, and, also, because, although the court in the condemnation case could not recognize the individual unit holders, any more than a court in an action involving a corporation would recognize the stockholders, the court in an equity action could protect the interests by making a certain fund applicable.

Now, those are the only issues that are before us, and I cannot see that it makes any difference whe-

(Testimony of Gustav de Bretteville.)

ther the Treasure Company is an alter ego or not, —is the alter ego of Mr. de Bretteville or not. I cannot see how it affects the issues in this case. I cannot order the corporation dissolved.

Mr. Hoge: Your Honor, you apparently directed your remarks to me in connection with what I said a while ago.

The Court: I mean to anybody, all counsel in the case.

Mr. Hoge: I have a thought on that. As I said a while ago, I agree with your Honor about the case being returned here to adjust the equities between the parties, but this case happens to be a general accounting action by certain royalty holders against the operator of the well, the Treasure Company.

The Court: Yes. [172]

Mr. Hoge: And I think the effect of the judgment in this case will be twofold. It will find what the rights of the parties as between themselves are, and it will also release possibly the amounts that are held in the registry of the court, in Judge Westover's court, and may be readjusted as a result of the judgment here.

The Court: No, that will require further action on his part in the light of the judgment here.

Mr. Hoge: In the light of the judgment here. I mean this judgment will affect that.

The Court: That is right.

Mr. Hoge: And, in addition, there may be a judgment here against the operator of the well to

(Testimony of Gustav de Bretteville.)

account for money that it has not accounted for.

The Court: But what difference does it make, so long as he is an individual defendant,—

Mr. Hoge: Yes.

The Court: —if he has in his possession funds which belong to the company, for which he has not accounted. He may be made to account for them regardless of the theory.

Mr. Hoge: Yes.

The Court: You have named them both.

Mr. Hoge: Yes. I am not advancing the alter ego theory—

The Court: Then you have to disregard the corporation, and you cannot say, "I will hold the corporation as to some, [173] and not as to the other." You have sued both of them.

Mr. Hoge: That is right.

The Court: I will stop further inquiry into the alter ego theory on the ground it is not material to the issues in this case. Furthermore, the evidence in this record and the testimony before the court shows that this corporation had an individual existence, and, therefore, this court would have no right to disregard that corporate existence in a collateral lawsuit.

If you want to impugn its existence, go into the State Court and have it done.

Now, let's go on to something else. besides, by making them an individual defendant, you have admitted the corporate existence, and, therefore, you cannot say, "I want to hold them as to some,

(Testimony of Gustav de Bretteville.)

and not as to the other." Either the corporation is his alter ego, and, therefore, they have no valid existence, and so they should go out as a cross-defendant, or whatever they are, in your lawsuit,—

Mr. Allen: They are defendants, your Honor.

The Court: —or if they are not a defendant, then they must go out. You cannot blow hot and blow cold at the same time, and have your say that as to some they are liable, and as to others, he is liable.

Mr. Allen: I understand that.

The Court: All right. Then there will be no further [174] inquiry on the theory of alter ego.

Mr. Allen: There is no necessity, then—

The Court: It is not material to the issues, and cannot be gone into under the pleadings of this case.

Mr. Allen: I take it, there is no necessity, then, of making any offer of proof on the alter ego theory?

The Court: No, that shows exactly because you have not pleaded any alter ego theory in any pleading you have set forth.

Mr. Allen: Yes, I have.

The Court: Where?

Mr. Allen: In the first complaint filed in this case and it has not been demurred to.

The Court: Then if you do that, I will ask you to dismiss your complaint against the Treasure Company, and when you do, I will let you prove it, and then you will be in a mess, because if I

(Testimony of Gustav de Bretteville.)

find that they are not his alter ego, the corporation will be out.

Mr. Allen: If that is your ruling, your Honor, I will have to abide by it, and that is all.

The Court: The alter ego theory has no business in this accounting, so there is no further offer to be made along that line.

Mr. Allen: All right, your Honor.

The Court: I will rule that on the basis of the evidence [175] already in the record.

Mr. Allen: Yes.

The Court: Furthermore, this testimony is cross examination.

Mr. Allen: That is right.

The Court: You complete the examination, and I will rule on the facts. Go ahead and complete the examination.

Mr. Allen: In view of your ruling——

The Court: No; no. I am going to withdraw the ruling, and I am going to let you put in the facts, so if you have additional facts you will not be able to say that I did not allow you to elicit matters in contradiction of the record. So I will withdraw the ruling, and I will allow you to go into the alter ego theory.

Mr. Allen: The only angle to it is this, your Honor,——

The Court: No, that is my ruling.

Mr. Allen: Yes, but when we get through, if it is found that there are monies that should have been accounted for, and instead of being in Treas-

(Testimony of Gustav de Bretteville.)

ure's pocket, Treasure Company's, they are in his pocket, that is the only angle we are after.

The Court: But he is an individual defendant, and if he has money that belongs to the corporation, even though, under the power of attorney he has the right to collect the money, he has no right to keep it, so that having made him an individual defendant, the judgment of this court can reach him [176] regardless of the alter ego theory.

Mr. Allen: That is all I want, then. I will just ask him one question in reference to——

The Court: So if you want to prove the alter ego theory, go ahead and prove it.

Mr. Allen: That is all I want, your Honor, that ruling, and that statement satisfies me.

Q. Mr. de Bretteville, did the Treasure Company recover a judgment for \$83,000 against the Union Oil Company and the RFC for damages, and including the value of the personal property of the Treasure well leasehold?

A. No, they only recovered a matter of somewhere around about \$3500, the Treasure Company.

Q. Well, what was the judgment in that action? It was for \$83,000, wasn't it?

A. The judgment was about \$83,000. There was the Samarkand—most of the money was owed to the Samarkand. There was only about \$3500 or less, because Mr. Bodkin settled or compromised the lawsuit for \$70,000, and the Treasure Company got its proportionate part of what the judgment called for.

(Testimony of Gustav de Bretteville.)

There were some items in the lawsuit that—I think that there were four or five or six items that belonged to the Treasure Company that were recovered, and the rest of the items, some 60 items or thereabouts—I am not sure—[177] there were 50 or 60 items that were items that belonged to the Samarkand Oil Company.

Q. Well, were you suing for the equipment and personal property on all these properties?

Mr. Kolliner: Your Honor, I am going to object to this line of questioning on the ground it is not the best evidence. This witness is being asked to testify as to the contents of a court record and the judgment of a court; in fact, this court.

The Court: I think preliminary questions are proper to identify the existence, but what the judgment decreed is not a question of proof. As it relates to the State Court, the court can only determine upon examining the judgment. Why should a layman be asked to interpret to whom the judgment ran?

Mr. Allen: Well, the Treasure Company was the plaintiff.

The Court: It does not make any difference whether they were the plaintiff or the defendant. The judgment would tell what it amounted to.

Mr. Allen: That is true.

The Court: And not his recollection of it.

The Witness: I could get a copy of the judgment.

(Testimony of Gustav de Bretteville.)

The Court: Where is it? Have you got it here?

The Witness: No, but I can get it.

The Court: It is available. I think further inquiry on [178] that should be stopped because it appears that it is a judgment, and whether it was arrived at by compromise or in any other manner, the judgment speaks for itself, and a layman should not be asked in regard to it. It is not a contract where, if it is ambiguous, you can ask a man who was a party to state what they meant by it.

* * * * * [179]

Cross Examination

* * * * * [180]

The Court: All right. Then on an accounting we don't need to go into that. Evidently, this is one of those fantastic oil deals with royalties, super-royalties, two-to-ones, very onerous contracts that were entered into in one way or another by people who had a little money when the other people are in distress. This is a contrary kind of a case. This isn't a case where somebody has been taken advantage of. It is a case where people have driven a bargain, and they want the benefit of their bargain. They may be entitled to it or not. I don't know. The contract will show whether they got what was coming to them.

So let's not go into side issues here. Each side wants to keep as much as possible, which is no more than human nature, but I don't want to go into all of these ramifications and complicate what

(Testimony of Gustav de Bretteville.)

is a simple lawsuit. This lawsuit is a simple lawsuit, and I am allowing you a lot of latitude because I am absolutely of the view that I could not make a proper finding contrary to the finding of Judge Westover, because all these people were before Judge Westover, and in that ancillary proceeding he had a right to determine it. But I am allowing you to put this in so that it can be argued, regardless of what the Court of Appeals said in the case is the law of the case, so that there is a foundation of [188] facts and a foundation in law to sustain certain findings to be made. That is why I am allowing you to go into it, and if I had done it the other way the case would probably have been ended by noon yesterday, because then there would have been very little to testify to.

So let's limit ourselves to the issues here and not go into side issues. Now, what is next?

Mr. Allen: Your Honor, I have nothing further of this witness. * * * * * [189]

Mr. Hoge: Q. Mr. de Bretteville, you have heard of this agreement with Mr. Bullen and Doctor Hayward, under which they were supposed to get their money back two for one out of fifteen per cent of gross production?

A. Yes, I believe that Mr. Scoville and Mr. Bullen and Hayward did have some sort of an agreement with—

Q. When did you first learn about that?

Mr. Rice: Will you talk a little louder, Mr. Hoge?

(Testimony of Gustav de Bretteville.)

Q. (By Mr. Hoge): When did you first learn about that?

A. It would be hard for me to pinpoint that time.

Q. Well, approximately?

A. Because it did not concern us, and so I didn't pay much attention to it.

Q. Do you recall having any discussions with Doctor Hayward or Mr. Bullen about it?

A. No, I didn't. I didn't meet Mr. Hayward or Mr. Bullen until some time in—I think it was the latter part of '39 or the early part of '40.

Q. That was after the well had been placed on production and had been running for some time?

A. Yes, that's right. [191]

Q. Did they talk to you about it then, and did they ask you why they weren't getting their money? Did they say anything about that?

A. I'm not sure. I'm not sure whether they ever did or not, but I think that there was some correspondence with them in the early part of 1940, and I believe the accountant sent them a statement.

Mr. Hoge: May I have that B-4 exhibit, Mr. Stacey?

(The document was handed to counsel.)

Q. (By Mr. Hoge): Mr. de Bretteville, I will show you a document which is a part of Exhibit B-4 here, which is an application to the Commissioner of Corporations for a consent to transfer certain royalty interests in escrow. I will call your

(Testimony of Gustav de Bretteville.)

attention to it, if I may. Do you want to read that by yourself? A. I would like to.

The Court: Read it to yourself.

Mr. Hoge: Have you finished yet? I think he is still on the first page, your Honor.

The Court: All right. You want him to read the entire document?

Mr. Hoge: I don't care. Apparently he wants to.

The Court: I think he has read enough. You see what question you want to formulate.

Mr. Hoge: I just want to ask him about a signature. [192]

Q. You see on Page 2 here, Paragraph II, it says: "Applicant, Walter B. Scoville, desires to assist in completing said well and certain of his friends and business associates are willing to advance the necessary funds, to be repaid two for one out of production."

A. Yes, I recall this.

Q. Do you recall this? You have seen it before?

A. Yes.

Q. I think you have been examined about it before, as a matter of fact?

A. Yes, I think so.

Q. And you see on Page 4 of this document, "Treasure Company, the issuer of the securities involved in the foregoing Application,"—that is, that these royalties are being transferred—"does hereby join in and consent to said Application. Treasure Company, by I. Cowan, Secretary."

A. Oh, yes, I recall this. In my absence Mr.

(Testimony of Gustav de Bretteville.)

Wynn induced Miss Cowan to sign this, and I was very much disturbed about it because of the fact that it did carry this language in there, and I took it up with Mr. Bodkin, and he said, "No, it's not that. It is just simply that the Treasure Company, by I. Cowan, the secretary, approved Mr. Scoville's"—that is, that we didn't object, the Treasure Company did not object to anything that they were doing, but that it was Mr. [193] Scoville's sole responsibility, and I believe that there is a court that ruled on that.

Mr. Allen: I object to this, your Honor, as being a conclusion of the witness.

The Court: That the court ruled on that may be stricken out. I mean, he has explained the presence of that statement there. All right.

Q. (By Mr. Hoge): What I want to know, Mr. de Bretteville, did you know that this arrangement had been made, did you authorize it, and did you approve it on behalf of Treasure Company?

A. No, we never did approve that at all. Mr. Wynn put this over on the Treasure Company.

Mr. Allen: I ask that be stricken as a conclusion of the witness.

The Court: We will strike that out. Anything further?

Mr. Hoge: I have nothing further.

* * * * * [194]

The Court: I will be glad to rule on the basis of the evidence in the case, and if you want to further examine this witness or offer other testi-

mony on the alter ego theory, I will allow you to do that, and we will determine later on what effect it may have upon your claim.

Mr. Allen: Here is my position, your Honor: When you state that any funds that he should have that belonged to the Treasure Company we can reach, I have no use in going further into alter ego.

The Court: All right. That is what this lawsuit is about.

Mr. Allen: That is all I care about.

The Court: You have sued him in his individual capacity, and an accounting being an equitable proceeding, the court may adjust accounts, and shuffle them, and reshuffle them, and tell this man to do this, and the other man to do that.

Mr. Allen: That is all I care about. I am perfectly satisfied with that ruling. [195]

The Court: You can do that. I am merely stating what your pleadings show, and what I can do.

* * * * * [196]

GUSTAV de BRETTEVILLE

called as a witness in his own behalf, and on behalf of other defendants, having been previously duly sworn, testified further as follows:

Direct Examination

Q. (By Mr. Rice): Mr. de Bretteville, there has been evidence introduced in this trial with respect to a meeting which took place at the drill

(Testimony of Gustav de Bretteville.)

site of Treasure Well, which was attended by Mr. Scoville, Walter Scoville, by his brother Francis Scoville, by Mr. Wynn, by Charles Franklin Johnson, an attorney, and by you, and in this meeting it has been testified that there was an agreement reached with respect to the furnishing of additional funds for the completion of Treasure Well on some two for one basis. Do you recall any meeting at the Treasure Well at which an agreement was reached for the furnishing of completion funds for the well on a two for one basis?

A. Never was a meeting of that kind.

Q. Do you recall a meeting at the well site at which the parties whom I have named were present on an evening? [200]

A. In what year?

Q. Well, do you recall any such meeting during the year 1938?

A. Yes.

Q. In what month of the year would that have been?

A. That was in May.

Q. In May of 1938?

A. That's right.

Q. Will you tell us what transpired at that meeting?

A. Well, at that meeting Mr. Wynn and Mr. Charles Franklin Johnson and I came together, and it was for the purpose of clarifying the agreement of April 5, 1938, and Johnson had quite a discussion, and so did Wynn, as to whether or not they had to furnish the completion money.

The conversation was not satisfactory to me, and I objected to them interpreting the contract that

(Testimony of Gustav de Bretteville.)

they didn't have to furnish the necessary money to complete that well, because the well had been drilled, and the windup of it was that Mr. Scoville and Mr. Seepie went outside of this field office, and talked things over, and came back and said, "You can buy us out for what we have in the well." And that was the end of the meeting. That is the only meeting that we ever had at the well at any time.

Q. Was there any discussion at that meeting whatsoever about a two for one pay back or new funds to be furnished? [201]

A. No, never.

Q. Did you individually, or did you, as president of Treasure Company, at any time ever agree with Mr. Scoville that monies furnished by Mr. Scoville for the completion of the well would be repaid on a two for one basis?

A. Never.

The Court: Was there any such agreement in regard to money furnished by Mr. Bullen or Doctor Hayward, or did you know that they were getting money from those people?

The Witness: Yes, I learned about that while I was in San Francisco through correspondence, but I didn't know what the terms were, and I didn't know until I saw that agreement, a copy of which I read this morning, which refreshed my memory.

Q. (By Mr. Rice): You referred to the application to the Corporation Commissioner?

A. That's right.

The Court: Now, the units to be given to Mr.

(Testimony of Gustav de Bretteville.)

Bullen and Doctor Hayward were to come out of Mr. Scoville's share?

The Witness: Yes, providing that they were entitled to that share.

The Court: But you didn't know that he had made an agreement whereby they were to receive two for one for the rest?

The Witness: No, I didn't know that until I came back from San Francisco some week or ten days later.

The Court: Did you keep minutes of the meetings of the—[202] what is the name of the company?

Mr. Rice: The Treasure Company.

The Witness: The Treasure Company.

The Court: —the Treasure Company?

The Witness: Yes, we did.

The Court: Have you looked to see if there is any record of any such meeting?

The Witness: Yes, I have.

The Court: Is there?

The Witness: No, there isn't.

The Court: Have you looked to see if there is any record where the Treasure Company was asked by you, or anyone else representing them, to approve any such agreement as is claimed was made by Mr. Scoville and the others at that meeting?

The Witness: No, there never was.

The Court: All right.

Q. (By Mr. Rice): Now, subsequent to this meeting to which you have referred as having taken

(Testimony of Gustav de Bretteville.)

place in May, 1938, were the tools of the well hung up? In other words, was there a cessation of operations at the well for a period of time?

A. Well, what years do you mean?

Q. 1938, subsequent to this meeting that you have identified as having taken place in May.

A. Well, if you go back to 1935, when we started the [203] well,—

Q. No, I am asking you now about 1938.

A. Yes.

Q. For how long a period of time was there a cessation of drilling operations following that May, 1938, meeting?

A. Well, we had—we were then in operation at the time, and we started somewhere along about the middle of April to rehabilitate this well. This well had been drilled, directionally drilled through the same hole about five different times prior to April, 1938.

Q. Then after you started in April of 1938, you continued drilling operations there for a period of time that ran into May or June, did you not?

A. No, it ran into May the 29th. That is when we surveyed the hole, and ran the Schlumberger.

Q. On May 29, 1938?

A. That's right.

Mr. Rice: May I see Defendants' Exhibit C, please.

(The document was handed to counsel.)

Q. (By Mr. Rice): Mr. de Bretteville, I show you a letter marked Defendants' Exhibit C, which

(Testimony of Gustav de Bretteville.)

is a photostat of November 2, 1938, a letter addressed to Treasure Company, and signed by Mr. Seeples. Do you recall having received that letter?

A. Yes. [204]

Q. Would you explain to the court the circumstances under which this letter was received?

A. Yes. I waited in Mr. Bodkin's office while Charles Gass, Mr. Bodkin's law partner, and Mr. Wynn went to Halvorsen and Halvorsen's office, and when they came back they came back with the original letter from which this photostatic copy is made.

Q. Were you expecting such a letter?

Mr. Allen: I object to that as immaterial.

The Court: I will sustain the objection.

Q. (By Mr. Rice): Was this letter received as a part of negotiations with Mr. Seeples?

A. That letter, when it was received by me, and, as you see, the signatures there are all Seeples's, the only thing that I could say at that time was that I did not know whether Seeples was authorized to sign for these various other people.

Q. Had you been negotiating with Mr. Scoville prior to the receipt of this letter?

A. I don't think so. I think all the negotiations were carried on through Bodkin and Gass.

Q. But Mr. Bodkin was your attorney, was he not?

A. That's right.

Q. Well, Mr. Bodkin was negotiating with your authorization, was he not?

(Testimony of Gustav de Bretteville.)

A. No, he was negotiating with the authorization of the [205] Treasure Company,—

Q. Right.

A. —because the Treasure Company paid the bills.

Q. Well, what was the negotiation about which Mr. Bodkin was conducting with Treasure Company's authorization?

A. Well, in June of that same year Scoville and the Adamant Company didn't go forward with the completion of the well.

Mr. Allen: I ask that be stricken as a conclusion of the witness, your Honor.

The Court: I will strike that. You can give a direct answer to the question.

Q. (By Mr. Rice): I would like for you to tell us, Mr. de Bretteville, what the scope of the negotiation was between Mr. Bodkin, as attorney for Treasure Company, and Mr. Scoville.

Mr. Allen: I object to that as apparently calling for hearsay.

The Court: I think it does call for hearsay. I don't know that it is of any materiality.

Q. (By Mr. Rice): Mr. de Bretteville, in this trial there has been introduced certain testimony of George Halverson, which was given in the condemnation suit, in the distribution proceedings before Judge Westover, I believe, in which Mr. Halverson stated, "I was representing—I have forgotten the title of the case that was brought, but the first case that was brought for declaratory relief,

(Testimony of Gustav de Bretteville.)

I went to your office,"—meaning [206] Mr. Bodkin's office—"met with Walter B. Scoville, met Mr. de Bretteville there, and we discussed the question of compromise, and the terms, somewhat the terms of resuming work on the well."

Was this letter of November 2nd which I have shown you a part of the compromise that was referred to by Mr. Halverson as having been the subject of a discussion with you and Mr. Bodkin?

Mr. Allen: I object to that as calling for a conclusion.

The Court: Overruled. I don't know what you are leading up to. Go ahead. Let's have the answer. I don't know what you are leading up to. Go ahead.

The Witness: That was the termination of this compromise, that they would furnish all the money necessary for the completion of the Treasure Well.

Mr. Allen: I ask that be stricken as a conclusion of the witness and disputes the——

The Court: I will sustain it on the ground that I don't think it is material. I will strike the answer.

We are concerned only with one question, and that is this: No one disputes that Mr. Scoville made this agreement. The only question is, did he bind himself by this two for one contract, or did he bind the others?

Now, I have allowed testimony to go in so there will be facts on which I can make a finding, although I believe it is [207] *res judicata*, because that question was before Judge Westover. He heard the evidence, and everybody, including Mr. Seeples,

(Testimony of Gustav de Bretteville.)

was before him. Everybody who is before the court here was before him, and everybody who could be bound was there. But I am allowing it to go in so that I do not need to base it upon that, but I can go into the facts and determine whether, aside from any question there, there is evidence enough to sustain a similar conclusion.

Then the rest of it is merely a question of this: Has Mr. de Bretteville received monies which have not been accounted for by him to the corporation? That is because the plaintiffs here, who have an interest, have a right to an accounting, so that it would be determined whether the award to them is correct, or whether it should be increased by reason of anything showing up in the accounting. And those are the only issues we have here.

The accounting is before the court, and I think from what was said this morning, with some little additional testimony from the record, we can straighten it out. It has occurred to me since noon that it will not even be necessary to make any special findings on the accounting, that the record will show we have taken additional testimony, and we can cover the whole thing in one set of findings. When the case is decided we will also make findings as to how the account stands, so that the whole thing can be covered in two sets of findings, [208] one relating to the facts to be found, and the other to the statement of account. So I cannot see the materiality of all these matters.

Sometimes the kind of conferences that were be-

(Testimony of Gustav de Bretteville.)

ing carried on may bear upon the question of whether it is claimed that a certain agreement was made on one side, and that it is denied on the other. He has already given us his version of the transaction, and what was going on as to the others is not material. Counsel have not brought in any of those other judgments, so it isn't necessary for you to explain what monies may have been received out of certain judgments, or to whom it went, so I don't see the materiality.

If you will tell me wherein you think it is material to any issue in this case, I will be glad to listen to you.

Mr. Rice: Your Honor, in our Answer we have set forth as an affirmative defense the fact that this agreement on November 2nd, which is now in evidence as Defendants' Exhibit C, was a part of a compromise which the parties entered into, under the terms of which Scoville and The Adamant Company were obligated to furnish all of the completion monies that were required for the completion of the well.

The Court: We have already heard the preliminary. The contract speaks for itself.

Mr. Rice: Very well.

The Court: And if the contract by its nature shows that [209] it was the intention to adjust everything, or to make certain conditions, then the contract is evidence of that. I cannot see how the preliminary matters matter. I have no objection to his saying that prior to the execution, or, you might

(Testimony of Gustav de Bretteville.)

state this, without going into details, you might state that this agreement was arrived at after lengthy discussions involving compromise, without going into the details, merely as a background, but I think that is already apparent from the testimony in the record.

Mr. Rice: Very well, your Honor.

Q. Mr. de Bretteville, did you at any time after the receipt of this November 2, 1938, letter receive any payments from The Adamant Company or Scoville with respect to the completion costs of the well?

Mr. Allen: I think, your Honor, that is all covered in the audit.

The Court: I beg pardon?

Mr. Allen: I think that is all covered in the audit.

The Court: That is all right. Overruled. Go ahead.

The Witness: There was a—no, I didn't receive any.

Q. (By Mr. Rice): Did the Treasure Company receive any?

A. There was a trustee fund that Mr. Seepie and myself signed the checks for on everything that was purchased, up to the point of wherever they had the funds in there, and when there wasn't any more funds, why, there wasn't any more need [210] to sign checks. And that fund was called the Treasure Company Trust Fund.

The Court: That money—this money that they

(Testimony of Gustav de Bretteville.)

derived from these side agreements, we might call them, was that turned over and was that in the name of Treasure Company or of this group by a trustee?

The Witness: No, it was put into a trust fund that was called the Treasure Company Trust Fund No. 1.

The Court: And that is the money from Mr. Bullen and Doctor Hayward?

The Witness: Yes, sir.

The Court: That money, so far as you were concerned, came to you or to Treasure through Scoville?

The Witness: Yes, it was put into a trust fund that Mr. Seepie and I signed the checks on.

The Court: I see. All right.

Q. (By Mr. Rice): Now, Mr. de Bretteville, on what date did the drilling operations—on what date was the Treasure Well completed?

A. Treasure Well was—the drilling on Treasure Well and the setting of the casing was completed around about the 1st of December, 1938, and then after that it was put on production, and was abandoned on the 15th day of December, 1938.

Q. Was it December 15, 1938, that Mr. Seepie ceased [211] to be at the drill site in charge of operations? A. Yes, sir.

Q. And on December 15, 1938, do you recall approximately how much in unpaid bills there were for the completion of the well?

A. Yes, a short time thereafter we learned they

(Testimony of Gustav de Bretteville.)

had run a credit of about \$38,000, a little more than \$38,000, which they had charged against this well, and were unable to pay.

Q. There were then unpaid bills for completion costs amounting to some \$38,000 on December 15, 1938?

A. Yes, sir.

Q. Now, when the drilling operations resumed on Treasure Well, which Mr. Seepie this morning testified to have occurred in November of 1938, that the operations were resumed there, was there credit for the completion costs of the well, which had been arranged by Mr. Scoville or The Adamant Company?

A. They negotiated for casing, and tubing, and other equipment to be placed upon the well, so that the well could be put on to production.

Q. Well, with whom did they negotiate?

A. Well, principally with Oil Tool Corporation.

Q. Where is that located?

A. In Long Beach.

Q. You say they negotiated. Did they complete the negotiations so that the credit was furnished by them? [212]

A. No, the Treasure Company—

Mr. Allen: I think, your Honor, that calls for a conclusion. The documents in the matter will speak for themselves.

The Court: Yes. I will sustain the objection.

Q. (By Mr. Rice): Did Treasure Company sign any notes to the Oil Tool Corporation in connection

(Testimony of Gustav de Bretteville.)

with the furnishing of equipment for the completion of the well?

A. Yes, the Oil Tool Corporation would not take——

Mr. Allen: I think the question has been answered, your Honor.

The Court: Just answer "Yes" or "No," and then you may explain.

Q. (By Mr. Rice): How much was the amount of the note the Treasure Company executed to Oil Tool Corporation, do you recall?

A. I believe it was somewhere around, in all about \$22,000, or thereabouts, and I think the first note was about between nineteen and twenty thousand.

Q. I believe you have already testified that there was no money received from Mr. Scoville or The Adamant Company after December 15, 1938; is that right?

A. What is the question?

Q. Did Treasure Company receive any money from Mr. Scoville or The Adamant Company after December 15, 1938?

A. No. [213]

Mr. Rice: That is all, your Honor.

The Court: All right. Cross examine.

Mr. Allen: Just one or two questions, your Honor.

Cross Examination

Q. (By Mr. Allen): On December 15, 1938, you were a member of the executive committee under the April 5th contract, weren't you?

A. That is right, but——

(Testimony of Gustav de Bretteville.)

Q. You have answered.

A. —I was forbidden to come upon the property by Mr. Wynn.

Mr. Allen: I ask that that be stricken as a conclusion of the witness, your Honor.

The Court: No, it is a modification of his answer, because the answer would imply that he was a trustee and had access to the property. He said he was, but he didn't have access to the property.

Q. (By Mr. Allen): When were these notes you claim were signed to the Oil Tool Corporation? Do you remember the dates?

A. I think that the first time when they first negotiated for credit there and couldn't get it, the Oil Tool Corporation had us sign some notes in about June, 1938, but the guarantee money was not put up by the Scovilles, so that deal fell flat, [214] and later on I think that they were to put up the necessary guarantee, and I think that that was somewhere in the latter part of November; I'm not sure.

Q. But it was in 1938?

A. But 1938. And then Oil Tool Corporation required that the Treasure Company sign the notes.

Q. Isn't that always required, that the operator of the well has to sign the notes?

A. Well, I objected—

Mr. Rice: Objected to as calling for a conclusion.

The Court: No, the question is, did he? All right.

The Witness: I objected to it because of the fact that they had signed this letter of November

(Testimony of Gustav de Bretteville.)

2nd, wherein they said that they would furnish all of the money, but eventually Mr. Bodkin said, "Well, this equipment is going over on to the Treasure Well, and you had better cooperate with them and sign that note."

Q. (By Mr. Allen): And you signed it?

A. Yes, the Treasure Company signed it and got stuck for it, for all of the bills.

Q. In other words, the bills were paid out of production, weren't they?

A. The bills were not to be paid out of production. They never paid for their interest, and the——

Q. Well, actually,—— [215]

The Court: Let him finish. Let the witness finish.

Mr. Allen: Very well.

The Witness: And, furthermore, the judgment states that they are to pay for their interests, and they never paid for it.

Q. (By Mr. Allen): The casing was paid for out of the production of the well at the rate of \$1,000 a month, wasn't it? A. That's right.

Q. And there was \$100 a month payable to the Lacey Tool Company, in addition to the \$1,000 a month, wasn't there?

A. Yes. At the time that they abandoned the well on the 15th day of December, I went around and saw the creditors, I borrowed the money, made a payment down to these various creditors, and arranged to pay for the rest of it, of the bills, out of production.

(Testimony of Gustav de Bretteville.)

Q. All right. At that time the Treasure Company had no funds, did it?

A. No, they didn't have any funds. I went out and borrowed the money to save the day.

Q. You knew all of this information in reference to the guarantee, and the purchase, and so forth, in 1938, the guarantee to the Oil Tool for the casing, and you knew that and you had that information, as you testified, in 1938, didn't you?

A. Yes, in 1938 I had that information.

Mr. Allen: Yes. If the Court please, I am just calling to the court's attention the fact that the State Court action was tried in 1940, and this is all *res judicata*. That is our position. That is all.

* * * * * [217]

Mr. Kolliner: Your Honor, there is one question and one answer in the deposition of Mr. Scoville, which I think should be read into the record.

The Court: All right, read it.

(Thereupon a portion of the deposition of Walter B. Scoville was read:)

Mr. Kolliner: It is on the bottom of Page 11 of the deposition:

"Q. Did the three of these parties"—and prior questions indicate the three referred to are Messrs. Seepie, Wynn and de Bretteville—"agree to the proposition that you gave them on the raising of the finishing money?

"A. No, they did not. Mr. de Bretteville was bound he was going to get rid of me and he went out of [225] his way to make propositions to others

wherein I would be skidded out of the picture. The letter of June 2nd is proof of that. However, he did agree to give other people two for one."

This is in the deposition of Mr. Scoville, and is in response to a question elicited by the counsel in Salt Lake City, or, rather, in Logan, I think it was, who took his deposition.

The Court: All right.

Mr. Hoge: I believe that there is something further on there, as I remember, in that deposition about Bullen and Hayward. I think maybe that should be completed, your Honor. As counsel read there, he said: "However, he did agree to give other people two for one."

And then: "Q. Can you name any person with whom he agreed to do that?"

"A. No, to my own knowledge I cannot tell you that.

"Q. Then did Mr. Seepie and Mr. Wynn agree on the proposition two for one plus 1% from your royalties?"

"A. They did. Not only did they agree to it but in one instance they raised money themselves under the same terms."

Mr. Kolliner: I would object to that, your Honor, on the ground that in so far as the raising of money is concerned, [226] it has been testified that these three constituted an independently acting committee, and in so far as any agreement that may have been made by Mr. Seepie and Mr. Wynn and Mr. Scoville is concerned, it is not binding upon the

defendant Treasure Company or the defendant de Bretteville.

The Court: It may go in, because Mr. Seepie is in court, and he has testified. It may be corroborative of what Seepie testified to. Whether it is binding on the others is not material. [227]

* * * * *

The Court: I am going to make a statement, and then I am going to arrange to have the matter briefed. I think the question should be briefed, or, let's put it this way: In the first place, I think there should be briefs in the case, but they should be limited to the following propositions:

First of all, whether the statute of limitations applies to Bullen and Hayward, or to the claim of \$13,000 by Mr. Scoville.

I may say that I am inclined to think that as we are dealing with persons who had no interest,—who were solicited, and not persons who were a part of the venture, that it may well be that the language recited by Mr. Scoville in the letter is broad enough to make an assignment or is broad enough to constitute, in reality, an assignment so that the statute of limitations would not begin to run until the fund came into existence.

However, I am of the view, and I don't want any argument on that point, that so far as Bullen and Hayward are concerned, first, that the finding of Judge Westover is determinative of the matter, and, second, that if it is [230] not, the facts in the case or the admissions contained in the letters by Dr. Hayward and others indicate that he was looking to

Scoville, and not to the Treasure Company. In other words, that the Treasure Company is not bound by the two for one agreement.

I am also of the view that under no circumstances could Scoville have cut himself in on a two for one agreement, when he was one of the interested parties, but the only question as to the \$13,000, there being no evidence in this case to show that it had been advanced, and the only point I want briefed is whether there are admissions in the record showing that that amount is due, and if there are, then the statute of limitations has not run. It can't run, in fact, and that would bring in the matter an action of whether it is properly deductible. [231]

[Endorsed]: No. 14897. United States Court of Appeals for the Ninth Circuit. Herschel Bullen, Mary H. Bullen, J. C. Hayward and Marian S. Hayward, Appellants, vs. G. de Bretteville, Treasure Company, Walter B. Scoville and The Adamant Company, Appellees. G. de Bretteville and Treasure Company, Appellants, vs. Walter B. Scoville and The Adamant Company, a corporation, Appellees. Transcript of Record. Appeals from the United States District Court for the Southern District of California, Central Division.

Filed: October 13, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14897

HERSCHEL BULLEN, MARY H. BULLEN,
J. C. HAYWARD and MARIAN S. HAY-
WARD, Appellants,

vs.

WALTER SCOVILLE and THE ADAMANT
COMPANY, Respondents.

STATEMENT BY APPELLANTS HERSCHEL
BULLEN, MARY H. BULLEN, J. C. HAY-
WARD AND MARIAN S. HAYWARD OF
POINTS UPON WHICH THEY RELY ON
APPEAL

Pursuant to Rule 17(6) of this Court, the above
named appellants adopt as their statement of points
upon which they rely on appeal the statement of
points on appeal filed in the District Court, which
they have designated as part of the printed record.

HOGUE & PERRY,

/s/ By FULTON W. HOGUE,

Attorneys for Appellants and Plaintiffs in Inter-
vention Herschel Bullen, Mary H. Bullen, J. C.
Hayward and Marian S. Hayward.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Oct. 20, 1955. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

STATEMENT BY APPELLANTS G. de BRET-
TEVILLE AND TREASURE COMPANY
OF POINTS UPON WHICH THEY RELY
ON APPEAL

Pursuant to Rule 17(6) of this Court, the above named appellants adopt as their statement of points upon which they rely on appeal the statement of points on appeal filed in the District Court, which they have designated as part of the printed record.

NICHOLAS & MACK,

/s/ By JOHN H. RICE,

Attorneys for Appellants G. de Bretteville and
Treasure Company, a corporation

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 28, 1955. Paul P.
O'Brien, Clerk.

No. 14897.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

G. de BRETTEVILLE and TREASURE COMPANY, a corporation,
Appellants,

vs.

WALTER B. SCOVILLE and THE ADAMANT COMPANY, a corporation,
Appellees.

HERSCHEL BULLEN, MARY H. BULLEN, J. C. HAYWARD and
MARIAN S. HAYWARD,
Appellants,

vs.

G. de BRETTEVILLE, TREASURE COMPANY, WALTER B. SCOVILLE and THE ADAMANT COMPANY, a corporation,
Appellees.

REPLY BRIEF OF ADAMANT COMPANY AND WALTER B. SCOVILLE, APPELLEES.

FILED

LELAND J. ALLEN,
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APR 21 1956

PAUL P. O'BRIEN, CLERK

*Attorney for Appellees, Adamant Company
and Walter B. Scoville.*



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G. de BRETTEVILLE and TREASURE COMPANY, a corporation,
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HERSCHEL BULLEN, MARY H. BULLEN, J. C. HAYWARD and
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Appellants,

vs.

G. de BRETTEVILLE, TREASURE COMPANY, WALTER B. SCOVILLE and THE ADAMANT COMPANY, a corporation,
Appellees.

REPLY BRIEF OF ADAMANT COMPANY AND WALTER B. SCOVILLE, APPELLEES.

Statement of Facts.

The complaint in this case was filed September 10, 1941 (over 14 years ago). Over 16 years ago and on December 14, 1939, Bullen and Hayward filed suit in the state court upon the same letter written by Bullen to his attorney Halverson and dated September 27, 1938, upon which they base their Complaint in Intervention in the case at bar. [Tr. p. 78.]

This Complaint in Intervention of Bullen and Hayward was filed January 29, 1953, in the case at bar. (More than six years after the California statute of limitations had barred their action.)

The September 27, 1938, letter provided: “* * * these funds, \$5,000.00 * * * to be repaid two for one out of the *first* 15% of gross production from the said well.” [Tr. p. 79.]

It was stipulated that the well produced \$205,411.68 (from 1938 to September 28, 1942, when taken by condemnation in case 2454-B-HW of this same district court) [Tr. p. 167] and that all of those moneys were handled by Treasure Company and Mr. deBretteville. [Tr. p. 167.]

“Mr. Hoge: My only purpose is to show that there was sufficient production to repay *this investment* out of 15 per cent of the production of the well.” [Tr. p. 167.]

There is no evidence to sustain the statement in the Bullen and Hayward brief at page 5 that the \$13,000.00 included the \$5,000.00 put up by Bullen and Hayward.

HERSCHEL BULLEN testified as follows:

“*Cross-examination*”

Q. (By Mr. Allen): And the two for one *was not chargeable* to Mr. Scoville’s personal interest, was it?
A. I think that’s right.

Q. That’s right. In other words, *it was not chargeable* to Mr. Scoville’s personal interest, nor to Mr. Bodkin’s nor to yours, nor to Mr. Hayward’s; isn’t that right? A. That’s right.

Q. But it was to come out of total production?
A. That’s right.” [Tr. p. 146.]

The trial court in the case at bar ruled:

“Formal findings and judgment to be prepared by Messrs. Nicholas and Mack, counsel for the defendants, under Local Rule 7.” [Tr. p. 94.]

THE PLEADINGS ADMIT THAT THE \$13,000.00 WAS PAID INTO THE COMPLETION FUND OF THE WELL BY THE PLAINTIFFS (ADAMANT COMPANY AND SCOVILLE) AND SAID FACT IS ALSO SHOWN BY THE EVIDENCE INTRODUCED BY THE PLAINTIFFS AND CONTAINED IN THE PARKER AUDIT.

Plaintiffs pleaded in the Second Amended and Supplemental Complaint, the stipulation, in full, in the so-called Vickers case in which the attorney for deBretteville and Treasure Company *admitted* that the “\$13,000.00 which ultimately went into the fund for the completion of the well.” [Tr. pp. 4-5.]

The answer in the case at bar fails to deny this allegation of the stipulation and, hence, admits it to be true.

Parker Audit [Pltf. Ex. 2] reads, in part, as follows:

“Cash Receipts: Percentage Holders Loan \$13,000.00.”

The Parker Audit reads *in the plural* which means Adamant Co. and Scoville.

The Original Complaint filed *by Adamant Company and Scoville* in the case at bar contains this pleading:

“That the defendants failed and refused to so cooperate and to put up their share of the monies so required, and the plaintiffs were thereby compelled and did raise an additional thirteen thousand (\$13,000.00) dollars or more, in cash, and secured a guarantee for the payment of the necessary casing, and other material, in the amount of twenty-four thousand, one hundred and twenty-eight (\$24,128.54) and 54/100 dollars, which said sum includes some additional cash.”

In the Answer filed by deBretteville and Treasure Company to the Original complaint are the allegations, reading as follows:

“That thereupon plaintiffs (Adamant Company and Scoville) herein, pursuant to said agreement furnished \$5,000.00 to enable work to be started * * *”

“That the plaintiffs thereafter advanced the sum of \$6500.00 and no more for use in the completion of said well * * *.”

(N. B. The stipulation admitted \$13,000.00 (not just \$11,500.00).)

The Findings in the Vicker's case *placed in evidence* in the case at bar by deBretteville and Treasure Company contained the following Finding:

“It was stipulated in open Court by counsel for all parties that the question of whether the defendants, or either of them, are chargeable with any part of the sum of \$13,000.00, being the amount, in addition to the original \$10,000 paid by plaintiffs Walter B. Scoville and The Adamant Company to complete said well, shall be left for determination at a future date, without prejudice to the rights of any party hereto, and need not be determined herein, and hence the Court makes no finding thereon.”

The plaintiffs (Scoville and Adamant Company) asked for an accounting from both defendants (deBretteville and Treasure Company) of all moneys that went into this venture which moneys include their original \$10,000.00 and the additional \$13,000.00. *It wasn't just* Scoville who asked for the accounting as the appellants would now contend.

We submit that by stipulation, by evidence contained in the Parker Audit, and by the admissions of the pleadings, both plaintiffs Adamant Company and Scoville have established the fact that the \$13,000.00 was advanced by them and the trial court was justified in rendering a judgment for both plaintiffs and against both defendants.

ARGUMENT.

The Transcript of Record Prepared by Appellants Deforms the Facts and Quotes Portions Suitable to Appellants Omitting Portions Favorable to Appellees.

One example follows.

The asterisks at page 199 of Transcript indicates the omission of very pertinent testimony given by appellant deBretteville.

He had testified that: He wrote all the checks of Treasure Company. That he never declared a dividend. That Treasure Company never declared a dividend. That he received a check on March 3, 1950, payable to Treasure Company in the sum of \$67,775.85. That he paid out said sum of money from the bank account of Treasure Company *to himself* in the following amounts:

March 31, 1950, to G. de Bretteville	\$27,775.85
June 15, 1950, to Trust Oil Co. (his corporation)	200.00
July 1, 1950, to G. de Bretteville	20,000.00
August 4, 1950, to G. de Bretteville	19,000.00
August 5, 1950, to Trust Oil Co. (his corp.)	323.00
November 8, 1950, to Edris deBretteville (wife)	476.00

(All but \$1,000 to himself)	Total \$67,774.85
------------------------------	-------------------

There are *many portions* of this printed record containing asterisks and thus indicating a *selection of evidence* by the appellants.

Appellees submit that the printed transcript *does not reflect a true report of the proceedings at the trial.*

The Statute of Limitations Has No Application to the Repayment of the \$13,000.00 From the Income From Treasure Well No. 8.

The money was not a gift and the money was accepted by deBretteville and his Treasure Company and put into the completion of the well and thus made its ultimate production possible.

There is a fiduciary relationship in this joint venture and defendants stand in a position of trustees who must handle the funds of the project with utmost good faith. It was the duty of the defendants to remit to plaintiffs the sum of \$13,000.00 out of the production of \$205,-411.68 realized by the venture. [Tr. p. 167.]

The Vickers findings and judgment introduced into the evidence *by appellants* in the case at bar declared this to be a joint adventure.

G. deBretteville or his Treasure Company *has never repudiated this trust*. He simply failed to pay the obligation impressed upon the trust fund by the terms of the acceptance of the \$13,000.00.

The said statute of limitations (2 years) Section 339(1) of the California Code of Civil Procedure *does not apply* to any of the allegations required *in this accounting action*.

“In all matters connected with his trust, a trustee is bound to act in the highest good faith towards his beneficiary and may not obtain any advantage therein over the latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind.”

Cal. Civ. Code, Sec. 2228.

“In 2 Perry on Trusts, section 863, the rule is stated as follows: ‘As between trustee and *cestui que trust*, in the case of an express trust, the statute

of limitations has no application, and *no length of time is a bar*. Against an express and continuing trust time does not run *until repudiation* or adverse possession by the trustee and *knowledge thereof* on the part of the *cestui*. . . . The trustee must clearly repudiate the trust and assume an adverse position, *with notice* to the *cestui*, before the statute can begin to run. . . . and *the section applicable to causes of action for an accounting* is section 343 (Code of Civil Procedure) *4-year statute.*'” (Emphasis added.)

Allsopp v. Joshua Hendy Machine Works, 5 Cal. App. 228-234.

The complaint seeking an accounting was filed in the case at bar on September 10, 1941. The well produced until September 28, 1942, when taken in condemnation by the government.

Appellees submit that the 4-year statute of limitations had not run and that the accounting upon the \$10,000.00 and the \$13,000.00, put into the venture by appellees, was required.

The Liability of deBretteville Is Fully Established.

He was the corporation known as Treasure Company and he conducted its affairs for his own benefit and as a screen for his own operations.

He admitted on the witness stand that he had the Board of Directors execute a purported power of attorney:

“* * * giving to the President, G. deBretteville, full power and authority to do and perform every requisite necessary in his judgment *as this Board of Directors would or could do.*” [Tr. pp. 205-206.]

He admitted on the witness stand that he wrote all checks of Treasure Company, that he and the company never declared a dividend and that he wrote checks and signed same as president of said company to himself individually in the total sum of \$66,775.85.

We submit that he operated the company as his own and that he knew when he took this \$66,775.85 that an action was pending for a full accounting in the case at bar.

We submit further that the trial court held that he had money of the corporation in his possession and hence rendered a judgment against him.

The Report of the Special Master Who Handled the Accounting Matter Disallowed Improper Charges Against the Well Amounting to \$34,833.49 but Was Not Followed by the Trial Court.

The Report of the Special Master [Tr. pp. 36-58] disallowed charges against this well made by deBretteville in the sum of \$34,833.49.

This sum should have been credited by the trial court to the owners of the 80.6 working interests. Since these appellees owned 41 working interests their portion amounted to \$17,718.97 of these disallowed and improper charges.

\$61,627.16 was the value of the capital assets of the venture and should have been credited to the 80.6 working interests. This was not done by the trial court.

The appellants deBretteville and Treasure Company *are many thousand of dollars ahead* when the trial court refused to follow the Master's Report, and, allowed all of these improper charges.

The trial court gave appellees a judgment for \$13,000.00 only and that was because they had advanced said amount in order that the well could be completed.

We submit that the appellants have no cause for complaint. Appellees should have had judgment for \$13,000.00 *with interest* from September 28, 1942, and \$17,718.97 being their portion of the improper charges which were disallowed by the Master and their portion of the value of the capital assets—which figures approximately \$64,000.00. And all we received was \$13,000.00 without interest in this judgment.

Argument Pertaining to the Appeal of Bullen and Hayward.

THE ADMISSION UNDER OATH OF MR. BULLEN THAT THE (\$10,000.00) TWO FOR ONE WAS NOT CHARGEABLE TO ANY INDIVIDUAL INTERESTS BUT “WAS TO COME OUT OF TOTAL PRODUCTION” SHOULD END THEIR APPEAL AND AFFIRM THE JUDGMENT OF THE TRIAL COURT.

An admission by the appellant that he has no charge against anyone's interest in the well is sufficient to terminate this appeal which should never have been filed, by reason of such an admission. [Tr. p. 146, testimony of Bullen.]

It certainly refutes the now claim of his attorney that Adamant Company's interest or Scoville's interest stands as security for the payment of something that “was not chargeable to any personal interest.”

THE STATUTE OF LIMITATIONS BARS THE COMPLAINT IN INTERVENTION.

“The first 15% of gross production of said well” *was available* long before September 28, 1942, with total production of \$205,411.68, on that date. This sum is the only “*res*” to which Bullen and Hayward could have any claim.

California Code of Civil Procedure, Section 337, requires an action upon a written contract to be brought within four years.

At the very latest this complaint in intervention must have been filed by September 28, 1946 (probably by 1944 as "the *first* 15% of gross production" exceeded the \$10,000.00 due on the alleged two for one letter). *The filing of the intervention on January 30, 1953, was too late.*

We quote from California decisions:

"* * * a complaint in intervention sets up a new cause of action, and admittedly also in favor of a third party, and the *doctrine of relation does not apply*. To determine, therefore, whether the action has been brought prematurely, or whether the *statute of limitations has run against it*, we must look to the *date* of the filing of the complaint in intervention and not of the filing of the original complaint." (Emphasis added.)

Graham v. Cal. Drilling, etc., Co., 49 Cal. App. 2d 522-526 (Feb. 1942) (*many cases quoted in opinion*).

"The United States courts follow the decisions of state courts in respect to the construction of local statutes of limitations."

Security Trust Co. v. Black River Nat'l Bank, 187 U. S. 211;

Dibble v. Bellingham Bay Land Co., 163 U. S. 63;

Great Western Tel. Co. v. Purdy, 162 U. S. 329.

Appellees submit that the statute of limitations barred the filing of the Bullen and Hayward complaint in intervention and the trial court so ruled.

THE FACT THAT THERE IS NO ENFORCEABLE LIEN AGAINST ADAMANT COMPANY AND SCOVILLE WAS DECIDED IN THE CONDEMNATION ACTION AND IS NOW RES JUDICATA BETWEEN THESE SAME PARTIES.

The application of the statute of limitations renders further response to Bullen and Hayward brief *unnecessary*.

However the following:

They now insist that they have an enforceable lien against that part of production owned by the parties to the two for one letter or alleged agreement.

(N. B. The condemnation jury award is *no part of the production* of the well as the production was \$205,411.68 received by deBretteville and Treasure Co.)

They appealed and filed an Opening Brief in the condemnation case No. 12961 of this Court of Appeal's files and they presented these points among others:

1. "The two for one agreement is a royalty."

(N. B. There are only 100 1 per cent outstanding royalties of which Bullen and Hayward owned 2, hence this bonus of \$10,000.00 could not be a royalty.)

2. "The two for one agreement is binding on all owners of the working interest."

3. "The two for one agreement is at least a charge on the interest of Walter B. Scoville."

4. "The appellants * * * have an equitable lien upon the interest in the well of the lessee, Treasure Company, to secure the payment to them of their share of the net proceeds of the operation."

All four points were decided against Bullen and Hayward and are now res judicata.

They cited *practically all* of their present authorities in their opening and reply briefs and their petition for a writ of certiorari in the former appeal in the condemnation matter. (Cir. Ct. No. 12961.)

They relied extensively upon the case of *Recovery Oil Co. v. Van Acker*, 96 Cal. App. 2d 909, but Adamant Company, Scoville, *et al.*, in their Reply Brief quoted fully from said case and showed that its decision applies only to an actual oil royalty and not to a Bullen & Hayward bonus contract (over and above the 100 per cent royalties) a vital distinction.

See:

United States v. Adamant Company, 197 F. 2d 1.

THE CONDEMNATION JUDGMENT IS RES JUDICATA OF ANY CLAIMED LIEN UNDER THE TWO FOR ONE LETTER.

The federal judicial procedure in eminent domain lies partly in equity and partly in law.

“Federal Judicial Procedure in this field lies partly at equity and partly at law. (Searl v. School District, 124 U. S. 197, 199, 8 S. Ct. 460, 31 L. Ed. 415.)”

Welch v. Tennessee Valley Authority (1939), 108 F. 2d 95-98 (cert. den., 1940).

Bullen and Hayward at pages 35 to 49 of their brief try to limit the condemnation action as a *limited* matter governed only by statute.

Then *why* did they submit their documents and oral testimony to Judge Westover to have him determine if they had any lien against Adamant Company or Scoville's interests in the condemnation award?

Now that they lost, they claim the court had no jurisdiction.

The equity jurisdiction invested in the condemnation hearing permitted a proper decision of these matters and they become *res judicata*. Even the "law" jurisdiction of the court permits such adjudication.

The Adamant Company and Scoville Are Not Bound by the Two for One Letter.

Judge Westover ruled that

"Neither the Treasure Company nor The Adamant Company executed said agreement between Walter B. Scoville and the Bullens and Haywards as parties, nor were said Treasure Company or the Adamant Company parties thereto, nor are the said Treasure Company or The Adamant Company bound thereby." [Tr. p. 146, Finding XXV in appeal No. 12961 Circuit Court—the condemnation case.]

"The enforcement of the so-called 'two for one' Agreement between the Bullens and the Haywards and Walter B. Scoville is a personal matter, and is not a matter for settlement in the within case." [Tr. p. 152, Conclusion VII in appeal No. 12961 Circuit Court.]

Appellees submit that Judge Westover did *not* hold said two for one to be an obligation but simply "a personal matter."

Furthermore there has been no evidence produced that the Adamant Company by resolution authorized anyone to even approve the letter of September 27, 1938. The trial court in the case at bar called said fact to the attention of Mr. Hoge by its remarks. [Tr. p. 175.]

No officer of the Adamant Company testified.

Ever since December 14, 1939 Bullen and Hayward have had an action entitled Hershel Bullen, Mary Bullen, J. C. Hayward and Marian S. Hayward, Plaintiffs, v. Walter B. Scoville, Treasure Company, Adamant Company, *et al.*, Defendants, Docket No. 447435 pending in the Superior Court of Los Angeles County based upon this same letter of September 27, 1938 and attempting to enforce its terms as they see it.

Conclusion.

Appellees submit that the judgment of the trial court in this accounting action as rendered against all the appellants is sustained by the evidence and contains no errors as to the appellants.

The appeals are without merit.

Respectfully submitted,

LELAND J. ALLEN,

*Attorney for Appellees, Adamant Company
and Walter B. Scoville.*

No. 14897

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

G. DE BRETTEVILLE and TREASURE COMPANY, a corporation,

Appellants,

vs.

WALTER B. SCOVILLE and THE ADAMANT COMPANY, a corporation,

Appellees.

Reply Brief of Appellants G. de Bretteville and
Treasure Company.

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G. de Bretteville and
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Appellees.

Reply Brief of Appellants G. de Bretteville and
Treasure Company.

I.

Appellees' Reply Brief Does Not Answer the Argument That the Judgment Below Awards Judgment to a Party Who Has Not Asserted Any Cause of Action Therefor.

In the Opening Brief of appellants de Bretteville and Treasure Company the argument was made that appellee Adamant Company has not asserted any cause of action in this lawsuit to support the judgment rendered in its favor.

At pages 3 and 4 of the Appellees' Reply Brief, appellees attempt to answer this argument by referring to various irrelevancies.

Appellees first refer to paragraph II of the second cause of action of their Second Amended and Supplemental Complaint [Tr. pp. 4-5], citing the allegations therein set forth as an admission that advances totaling \$13,000 went into a fund for the completion of the well. It is appellants' contention that the stipulation of counsel quoted in this paragraph (which was entered into in the lawsuit before Judge Vickers in the state court) was not intended to be and is not an *admission*, its sole purpose having been to delineate the issues before the court in that particular case. Furthermore, it should be noted that the language of the stipulation makes no reference whatever to the *source* of the funds then under discussion and therefore lends no support to the proposition that \$13,000 was advanced by *both* appellee Scoville *and* appellee Adamant Company under an agreement that repayment would be made to *them*.

Appellees next refer to the so-called "Parker Audit" which was introduced as their exhibit. Obviously appellees cannot rely upon their own evidence to fill in gaps in their pleadings, even if the "Parker Audit" could be construed to stand for what they read into it. The "Parker Audit" was *not* the basis of the determination of any issues in the accounting before the Special Master inasmuch as the "Moore Audit" was used for this purpose [Tr. p. 38].

The third reference made by appellees is to the *original* complaint which they filed in this lawsuit and to the *original* answer of appellants. Both of these pleadings were superseded and neither can be leaned upon in this appeal.

The law is clear as to the effect of an amended pleading, when filed, on the original pleading. In 21 Cal. Jur. 213 it is stated in Sec. 146:

“An amended pleading which is a valid subsisting pleading and entitled to recognition as such, supersedes the original, even when the amendment is made to conform to the proofs. While the original pleading is still a part of the judgment-roll, it performs no function as a pleading; it cannot be looked to for the issues to be tried; and is not admissible in evidence for or against the one filing it. *The averments of the original cannot be used to disprove those of the amendment, for otherwise one would reap no benefit from his amendment*; and to allow the introduction of the original generally as evidence in favor of the party filing it, would, it has been said, permit one to manufacture testimony in his own behalf.” (Emphasis added.)

In *Grubbs v. Smith*, 86 F. 2d 275 (C. C. A. 6, 1936), cert. den. 57 S. Ct. 437, it was held that an amended and substituted petition supersedes prior pleadings, irrespective of the plaintiff's intention. The court said at page 275 of 86 F. 2d:

“A preliminary question arises as to whether the action in the court below was pending upon all of the pleadings named or upon the amended and substituted petition only. That it was the intention of the plaintiff that the amended and substituted petition should supersede the petition and the amended petition appears from the amended and substituted petition itself. It contains 107 typewritten pages, recites that it is filed in compliance with the order of the court requiring the plaintiff to combine his petition and amended petition in one amended and substituted petition, and, by reference, incorporates all of the ex-

hibits theretofore filed in the action with the petition and the amended petition the same as if copied in full in the amended and substituted petition. But whatever the plaintiff's intention, as a matter of law the amended and substituted petition supersedes the prior pleadings in the case. *Ferguson, Ex'r. v. Meredith*, 1 Wall. (68 U. S.) 25, 17 L. Ed. 604; *Brown Sheet Iron, etc., Co. v. Maple Leaf etc. Co.* (C. C. A. 8), 68 F. (2) 787; *Aetna Life Ins. Co. v. Phillips* (C. C. A. 10), 69 F. (2) 901; *Bedell v. Baltimore & O. R. Co.* (D. C. E. D. Ohio), 245 F. 788."

In passing, it should be emphasized that appellees attempted to incorporate by reference all of the allegations of their original complaint in their Second Amended and Supplemental Complaint, but the trial judge expressly ruled that this could not be done and ordered the incorporating clause stricken from the pleading, as is evidenced by Clerk's marginal notation on the instrument [Tr. p. 3].

Finally, appellees refer to a particular finding of Judge Vickers in the earlier trial in the state court which had been placed in evidence by appellants de Bretteville and Treasure Company as part of the entire record of the Superior Court case [Deft. Ex. "Q"]. This finding, as quoted on page 4 of Appellees' Reply Brief, is by its very language merely a finding that no finding is made. It offers no support for appellees' argument that their Second Amended and Supplemental Complaint contains allegations in its second cause of action which support the judgment in favor of appellee Adamant Company.

II.

Appellees' Argument That Appellants Have Deformed the Record on This Appeal Is an Unwarranted and Baseless Accusation.

At page 5 of Appellees' Reply Brief appellees have contended that the Transcript of Record designated by these appellants does not reflect a true report of the proceedings at the trial.

On the pretense that appellants de Bretteville and Treasure Company have unfairly omitted pertinent testimony by inserting asterisks at page 199 of the Transcript, appellees have included in their brief, *in narrative form*, testimony which they state was given by appellant de Bretteville.

Appellants de Bretteville and Treasure Company have not agreed to the *narrative form* of the testimony as set forth in Appellees' Reply Brief, and in defense of the serious charge which is implied in this particular argument, these appellants state that the record on this appeal was designated in good faith and in conformity with Rule 75 of the Federal Rules of Civil Procedure. Appellants submit that appellees should not be heard to complain to the completeness of the record on appeal, inasmuch as appellees had an opportunity to designate any portions of the Reporter's Transcript which they chose to include and failed to take advantage of their opportunity to do so.

In *Associated Indemnity Corporation v. Manning, et al.*, 107 F. 2d 362 (1939), this Court held that the trial court's findings are subject to attack on appeal as against an appellee's insistence that all of the evidence is not in the record where the appellant had complied with the rule in effect when the appeal was taken and where the appel-

lees had not called attention to any material evidence omitted from the printed record.

In *William Howard Hay Foundation v. Safety Harbor Sanatorium*, 145 F. 2d 661 (C. C. A. 5, 1944) (cert. den. 324 U. S. 877, 89 L. Ed. 1429, 65 S. Ct. 1024), plaintiff below had filed his designation of the record in connection with his appeal. The defendant below had neither filed his own designation nor objected to the one which plaintiff had filed, and the record was accordingly prepared by the clerk in accordance with the plaintiff's designation. The Court said at page 663 of 145 F. 2d:

“* * * Here defendant, as appellee, does, indeed, complain that he did not know, and was not advised, of the filing of plaintiff's designation with the clerk until after the record had been made up and lodged in this court. He does not, however, invoke our authority under Rule 75, Rules of Civil Procedure, 28 U. S. C. A., following Section 723c, to amend, enlarge, complete, or otherwise correct or supplement the record, and though it does appear that its preparation had been attended by confusion of thought and action, no reason is presented to us, or appears, why we should not consider and decide the appeal on the record as filed, and we do so.”

In *Laughlin, et al. v. Berins*, 118 F. 2d 193 (C. A., D. C., 1940), it was held that the Court of Appeals must under the Federal Rules accept the statement of evidence drawn by the plaintiff where the defendant files no objection thereto.

The testimony which appellees attempt to have considered by this Court, *even though it is not included in the Transcript*, is not pertinent to the issues before this Court, inasmuch as it was elicited by appellees in an abortive attempt to obtain a judgment holding appellant Treas-

ure Company to be the *alter ego* of appellant de Bretteville. At page 12 of the Opening Brief of these appellants it is shown that appellees retreated from this attempt during the trial after the trial court had clearly indicated that the question of *alter ego* was not within the issues of the case, as framed by the pleadings.

The judgment below does not hold that appellant Treasure Company is the *alter ego* of appellant de Bretteville, and this question is not before this Court on this appeal.

It should suffice, in answer to the innuendoes of Appellees' Reply Brief, to restate the conclusion of the trial court that "there were no improper charges or withdrawals or misapplication of funds by defendant Treasure Company or by defendant G. de Bretteville during the period covered by said accounting" [Finding II, Tr. p. 102], and also to quote from the trial court's decision that "no funds in which the plaintiffs or any of the other parties to the action have any interest are now in the possession of the defendants or either of them" [Tr. p. 93].

III.

Appellees' Reply Brief Does Not Answer the Argument That the Judgment Below Ignores the Defense of the Statute of Limitations Raised in Appellants' Answer.

At pages 6 and 7 of Appellees' Reply Brief, the argument is made that the statute of limitations has no application to the second cause of action in the second amended and supplemental complaint because the money is owed by appellants as joint adventurers with appellees.

The defense of the statute of limitations was pleaded in Appellants' Answer [Tr. p. 26], but the judgment below

from which this appeal is taken contained no finding of fact nor conclusion of law with respect to the issue of the applicability of the statute of limitations as a defense to *these* appellants.

The judgment below was based upon the theory that \$13,000 had been advanced for the completion of Treasure Well No. 8 on an understanding that the advance was to be repaid, and this theory, of course, embraces a loan transaction and not a *trustee and cestui que trust* relationship.

Paragraph V of the second cause of action in the Second Amended and Supplemental Complaint alleges an agreement to repay the advances to appellee Scoville as an oral contract and not a written agreement [Tr. p. 7]. Accordingly, the applicable period of the statute of limitations is two years and not four years. The alleged oral agreement having been made prior to May 15, 1938, is outlawed because the subject lawsuit was not filed until September 10, 1941.

IV.

Appellees' Reply Brief Contains an Attack on Portions of the Judgment Below From Which No Appeal Has Been Brought to This Court.

At pages 8 and 9 of Appellees' Reply Brief the argument is made that this Court should disregard this appeal because the trial court erred in not granting relief to appellees under the *first cause of action* in the second amended and supplemental complaint.

Appellees have brought no appeal to this Court from the judgment of the trial court and it is not proper for them at this time to raise questions with respect to the sufficiency of the judgment below on the first cause of

action of their complaint. The record on this appeal was not prepared with any such argument in view, and it is submitted that this Court should disregard such argument in its entirety.

V.

Appellees' Reply Brief Offers No Answer to the Argument That the Judgment Below Is Not Supported by Appropriate Findings of Contractual Liability or of Admissions of Liability on the Part of These Appellants.

At page 2 of Appellees' Reply Brief, appellees have apparently dismissed all arguments raised in the Opening Brief of appellants de Bretteville and Treasure Company with regard to the insufficiency of the findings which support the judgment below, by quoting from the record the trial court's ruling that findings of fact and conclusions of law were to be prepared by counsel for these appellants.

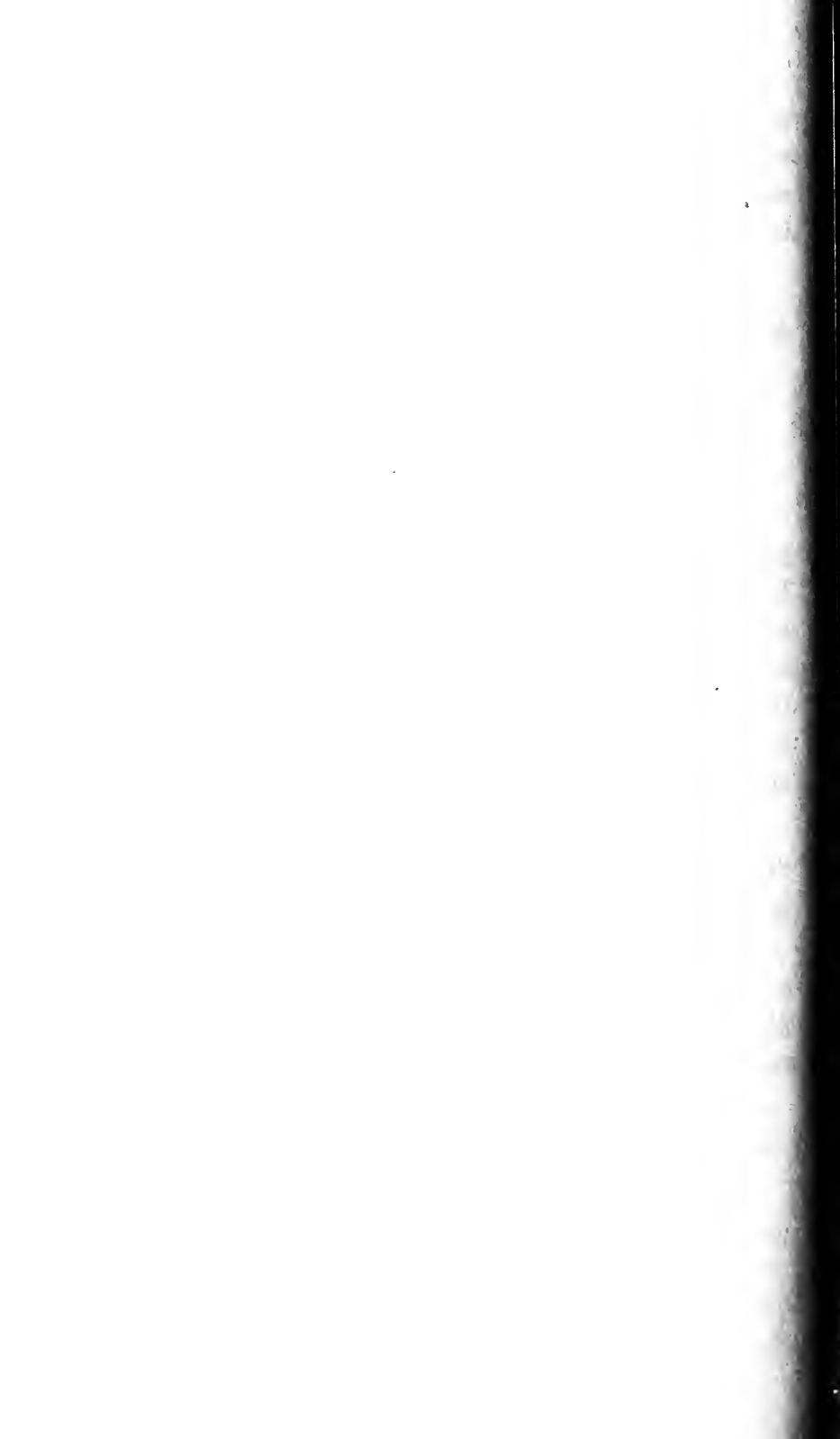
As officers of the court, counsel for these appellants drafted for the trial court both findings and conclusions in strict accordance with the court's written decision.

Though not included in the record on this appeal, counter-findings and counter-conclusions were thereafter filed on behalf of these appellants but were not adopted by the trial court.

Respectfully submitted,

JOHN H. RICE, and
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Treasure Company.*



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Brief of Adamant Company and Walter B. Scoville, Appellees.

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Brief of Adamant Company and Walter B. Scoville, Appellees.

I.

The State Court Action Is Immaterial.

The appellees refer, on pages 1 and 14 of their reply brief, to a State Court action filed in 1939 by the appellants, in which they sought to enforce the two for one agreement. The record in that case is not in evidence before this Court, but it may be said, in answer to any implications which the appellees may be suggesting, that service was had upon The Adamant Company and Treasure Company in that case; that Scoville was not served; and that after the condemnation by the Federal Government, which took the property out of the jurisdiction

of the State Court, counsel paid no attention to that case until recently. The case has been recently dismissed as against Scoville for lack of prosecution, it appearing that he came into California and resided here for more than five years, and so could have been served. The action was also dismissed as against Treasure Company, on the ground that the decision of this Court in the condemnation case was *res judicata* as to it. The case was tried on April 9, 1956, as to The Adamant Company, and judgment for the defendant has been directed by the Court, but not signed or entered. The ground of decision does not appear from the notice given by the Clerk. It may well be that the Court was of the view that the obligation was secured by the interests in production of the parties to the agreement, but that there was no personal liability. Following the condemnation the State Court could, of course, give only a personal judgment. In any event, the judgment is not final, the record is not before this Court, and it would seem that the case, therefore, should have no bearing on the decision of the Court in the case at bar.

II.

The Amount of Prior Production Is Immaterial.

In *Recovery Oil Co. v. Van Acker*, 96 Cal. App. 2d 909, 216 P. 2d 483, the document involved entitled the holder to the proceeds of 15% of the oil saved and sold until the sum of \$10,000.00 had been paid. The point was made in that case, also, that the production had been such that 15% of it would have paid the indebtedness. The Court held that this was immaterial, and that the security continued against the interest in the property of the person who signed the document. At page 485 of the report in 216 P. 2d, the Court says:

“Finally, the appellant contends that the Court erred in refusing to permit it to prove, by the testimony of a Supervisor of the State Division of Oil and Gas, that the production of oil on the leased premises prior to four years before this action was filed was sufficient, at market prices, to have enabled respondent’s claim to have been paid in full. It is argued that . . . the testimony . . . would have established that the respondent could have been paid prior to 1941; that it follows that her claim was barred by the statute of limitations; . . .”

The Court ruled against the appellant on this point, and said on the same page:

“No date was fixed for the termination of her interest and it was conditioned upon her receiving the money, and not upon the production of an amount sufficient to pay the money.”

The same point was raised in *Phillips Petroleum Co. v. Gable*, 128 F. 2d 943, where, as in the case at bar, payment was to be made out of the first proceeds of a certain percentage of production, and the Court held that the lien continued against the remaining property interest of the person who entered into the undertaking, regardless of the amount of prior production.

III.

The Appellants’ Money Went Into the Completion of the Well.

The appellees say, at page 2 of their brief, that there is no evidence to sustain the statement in the Bullen and Hayward brief that the \$13,000.00 included the \$5,000.00 put up by the appellants. The Court found that the money put up by these appellants “was used as part of the funds by which said oil well, Treasure Well No. 8,

was placed on production . . .” [Tr. 106.] The checks given by these appellants bear the endorsement of G. de Bretteville, for the Treasure Company Trust Fund [Pltfs.-in-Intervention Ex. B-3], as well as the endorsement of George Halverson, to whom they had been sent, and who was then representing Scoville and The Adamant Company in a controversy with de Bretteville and Treasure Company. Scoville wrote to the appellants that the controversy had been composed, and that the moneys would be paid over. [Tr. 195.] de Bretteville testified that the money was received from Bullen and Hayward, although denying that he or his company knew anything about the agreement to repay it two for one. [Tr. 221.]

IV.

The Testimony of Mr. Bullen Does Not Have the Effect Contended for by the Appellees.

The appellants, at page 2 of their brief, refer to certain testimony by Mr. Bullen, and at page 9 contend that it constitutes an admission that there was no charge against anyone's interest in the well. The testimony of Mr. Bullen was simply that payment of the money was to come out of production from the well. His statement that it was not to be charged against any particular interest simply means that the charge was to be borne pro rata by everyone who was a party to the agreement, and appellants have conceded that their 2% participating royalty interest should bear a part of the charge. So far as Mr. Bullen knew, all the holders of the working interest had agreed to the proposition. He knew that there was a dispute between Scoville and de Bretteville, but, as above noted, Scoville wrote him that they had reached an agreement. [Tr. 195; Pltfs.-in-Intervention Ex. B-2.]

V.

The Lien of the Two for One Agreement Is Not Res Judicata by Virtue of the Condemnation Judgment.

It is believed that the other points have been sufficiently covered by appellants' brief, and no useful purpose would be served by continuing the argument about the statute of limitations and *res judicata*.

On the latter point, however, it seems to be suggested at page 12 of appellees' brief that we are wrong in our contention as to the limited jurisdiction of the Federal Court in a condemnation matter. Whether rightly or wrongly, this Court held in the condemnation case that it could not adjudicate the rights of royalty holders, from which it necessarily follows that it could not adjudicate the rights of creditors of such royalty holders. Even if this Court should later decline to follow its holding in that respect, the holding prevents the ruling, if any, on the merits of the two for one agreement from being *res judicata*. The Restatement of Judgments, Sec. 67, states:

"Where in an action the court holds that the plaintiff cannot enforce a particular claim in that action on the ground that he can enforce it only in a separate action, the judgment does not preclude the plaintiff from enforcing the claim in another action, although in the second action it appears that the holding of the court in the first action was erroneous."

It may be noted, however, that the condemnation case is not the first case in which this Court has held that royalty holders are to be treated as stockholders. *In re Lathrap*, 61 F. 2d 37, was a bankruptcy of the lessee of an oil lease, and it was held that creditors of the enterprise, *i. e.*, those who had made advances for the development of property, had priority over royalty holders.

VI.

The Adamant Company, as Well as Scoville, is Bound by the Two for One Agreement.

We do not wish to prolong this discussion, but in reference to the statement on page 13 of the appellees' brief that there was no evidence that The Adamant Company authorized the signing of the agreement by a resolution of its directors, it is believed that the Court will take judicial notice of the fact that if formal resolutions were always required to bind corporations to their obligations, it would be very difficult to do business, and that probably 90% of corporate obligations are not supported by directors' resolutions.

As to the point that no officer of The Adamant Company testified, this could easily have been remedied by its counsel, and it is submitted that a *prima facie* case of duly authorized execution of the contract was established.

Conclusion.

One further point which should perhaps be noted is the statement on page 11 of appellees' brief that "The condemnation jury award is no part of the production of the well as the production was \$205,411.68 received by de Bretteville and Treasure Co." Under the age-old principle that an agreement to pay a sum of money out of the production of real property creates a lien, at least in equity, upon the property itself, or the interest of the obligor in such property, it is submitted that the two for one agreement created a lien against the property, to wit, the royalty interests of Scoville and The Adamant Company. The jury award stands in lieu of that property interest, and no authority is needed for the proposition

that if there was a lien against the property, the lien persists against the award. Actually, this award was based upon expert testimony as to the net value, as of the date of taking, of the estimated future oil production from the well, and so, in a very real sense, it represents production. As noted under Point II above, the fact that prior production had been sufficient to satisfy the lien is immaterial.

Respectfully submitted,

HOGGE & PERRY,

By FULTON W. HOGGE,

*Attorneys for Appellants Herschel Bullen, Mary H.
Bullen, J. C. Hayward and Marian S. Hayward.*





